(17,732.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 262.

THE SUN PRINTING AND PUBLISHING ASSOCIATION, PETITIONER,

vs.

WILLIAM L. MOORE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the district court of the United States for the southern district of New York	1	1
Statement	1	1
Libel	2	1
Interrogatories	8	5
Answer	14	9
Exhibit A—Charter-party, April 1, 1898	21	14
B—Charter-party, May 14, 1898	23	15
C—Agreement of suretyship, May 14, 1898	25	16
Answers to interrogatories	26	17
Order amending libel, &c	33	21
Evidence for libellant	35	22
Exhibits offered, &c	35	22
Testimony of Wm. L. Moore	36	23
Olaf Petersen	39	25
Exhibit 1—Letter, Thos. Manning, agent, to yacht-keeper, April 1, 1898	57	41

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 28, 1900.

	Original.	Print
Exhibit 2—Telegram, W. L. Moore to yacht-keeper, April 1, 1898	58	41
3—Envelope of W. U. Telegraph Co.	58	41
4—Letter, J. Archibald Murray to Olaf Petersen, March 4, 1899	58	41
5—Subpœna to Olaf Petersen	59	41
Testimony of Leonard O. Macdaniel	59	42
Exhibit 6—Check from the Sun to Thos. Manning, April 2, 1898	62	44
7—Check from the Sun to Thos. Manning, May 14, 1898	63	45
Extracts from the Sun offered	94	70
Testimony of Leonard O. Macdaniel (recalled)	97	71
James P. J. Morris	98	72
Harold M. Anderson	102	75
Edward I. Wolfe	109	81
Harry Gasper	110	82
Evidence for respondent	128	97
Testimony of Stephen B. Atkinson	128	97
Commissioner's certificate	171	130
Evidence for libellant	172	131
Testimony of Thomas A. St. Johnson	172	131
Leonard O. Macdaniel	174	132
Sidney Chubb	193	147
Henry G. Paine	198	150
J. Henry Harper	201	152
Evidence for respondent	203	154
Testimony of Thomas Hitchcock	203	154
Evidence for libellant	209	159
Testimony of Wilbur J. Chamberlin	209	159
Albert Lee	227	172
Aaron H. Bradley	230	175
Percy Chubb	232	176
Ervin Wardman	235	179
Dewitt C. Packard	236	180
Frank Bowne Jones	242	184
Ferdinand B. Knight	245	187
James Jacob Lewis	249	189
Ferdinand B. Knight (continued)	250	190
Wilbur J. Chamberlin (recalled)	264	201
Carl W. Jungen	265	202
Wm. L. Moore (recalled)	278	211
Loring T. Hildrith	282	214
Evidence for respondent	283	215
Testimony of Stephen B. Atkinson	283	215
Paul Dana	300	227
Leonard O. Macdaniel	321	245
Franklin Bartlett	325	248
Libellant's Exhibit 1—Certificate of incorporation of the Evening Telegraph Association	328	250
2—Act to change the name of the Evening Telegraph Association	331	251
3—Charter-party, April 1, 1898	332	252

	Original.	Print
Libellant's Exhibit 4—Charter-party, May 14, 1898	334	253
5—Agreement of suretyship, May 14, 1898	335	254
8—Insurance receipt, April 23, 1898	337	255
9—Insurance receipt, June 11, 1898	337	256
10—Insurance receipt, July 30, 1898	338	256
11—Article from the Morning Sun, September 11, 1898	339	256
12—Agreement of suretyship, April 1, 1898	340	257
13—By-laws of the Sun Printing and Publishing Association as amended June 28, 1898	341	258
14—Letter, L. O. Macdaniel to Chubb & Son, July 12, 1898	343	259
21—Circular from Hydrographic Office, May 4, 1898	344	259
Respondent's Exhibit A—By-laws of the Sun Printing and Publishing Association, amended June 27, 1893	346	260
B—Minutes of the board of trustees of the Sun Printing and Publishing Association, April 26, 1898	348	262
Opinion of Brown, J.	349	262
Final decree	358	268
Notice of appeal by respondent	359	268
Assignment of errors by respondent	361	269
Notice of appeal by libellant	373	277
Assignment of errors by libellant	374	277
Clerk's certificate	376	278
Opinion of Wallace, J.	377	278
Final decree	384	283
Clerk's certificate	386	283
Writ of certiorari	388	284
Stipulation as to return to writ of certiorari	391	285
Clerk's certificate and return to writ of certiorari	392	285

a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM L. MOORE, Libellant, Appellant,
vs.
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent, Appellant.

Transcript of Record.

Appeal from the district court of the United States for the southern district of New York.

[Stamped ·] United States circuit court of appeals, second circuit. Filed Dec. 8, 1899. William Parkin, clerk.

1 U. S. District Court, Southern District of New York.

WILLIAM L. MOORE, Libellant, Appellant,
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent, Appellant.

Statement.

1898.
Nov. 16. Libel filed.
Dec. 29. Answer filed.
1899.
April 14. Cause tried before Hon. Addison Brown, U. S. dist. judge.
June 28. Opinion rendered directing decree to be entered for libellant for $65,000, interest and costs.
Aug. 24. Final decree entered.
Sep. 9. Notice of appeal filed by libellant.
" 8. Notice of appeal filed by respondent.

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of William L. Moore against the Sun Printing and Publishing Association, a corporation organized and existing under the laws of the State of New York, and doing business in and being a resident of the district aforesaid, in a cause of contract, civil and maritime, alleges as follows:

First. That at and prior to the dates hereinafter mentioned the respondent corporation was engaged in the business of printing and publishing a daily newspaper in the city of New York, known as the New York Sun, and that a part of the business of said respondent consisted in the procuring and publishing of information and news to the readers of said paper respecting events and occurrences happening from time to time within the United States and elsewhere.

Second. That prior to the first day of April, 1898, the inhabitants of the island of Cuba, then owned by the Kingdom of Spain, were and had been in a state of insurrection and rebellion, and on or

about the date aforesaid, the respondent, in order to enable its employees and representatives to observe, so far as practicable, the various incidents and occurrences connected with such rebellion, for the purpose of procuring the publication thereof in said newspaper, did through its agent, Chester S. Lord, make and conclude at the city of New York, through libellant's agent, Thomas Manning, a charter-party with the libellant, who was then the owner of the steam yacht *Kanapaha*, then in the port of New York, wherein and whereby the libellant, for and in consideration of the covenants and agreements therein mentioned to be kept and performed by the said respondent, did charter and hire to the respondent the said yacht in the condition that she then was and with all her gear, tackle and furnishings, as they then were for the term of two months from the 1st day of April, 1898, to and until the 1st day of June, in
3 said year, for the sum of $5,000, which amount was paid by respondent to libellant's agent on the execution of said charter-party.

Third. That said respondent for and in consideration of the covenants and agreements to be kept and performed by the said libellant chartered and hired the said yacht for the period aforesaid and covenanted and agreed to pay the sum above mentioned to the libellant, or his agent, for such hire, and further covenanted and agreed, among other things, as follows, that is to say:

1. To overhaul and repair and put said yacht in commission at its own expense.

2. To keep in repair at its own costs and expense said yacht, its hull, tackle, spars, furniture, gear and boats during the continuance of said charter-party.

3. To pay all running expenses of said yacht, including amongst other things uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges during the continuance of said charter-party.

4. To surrender said yacht with all its gear, furniture and tackle, at the expiration of the term of said charter-party to said libellant, or his agent, at Manning's basin, foot of 26th street, South Brooklyn, in the port of New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or any description.

5. To use said steam yacht as a yacht only and under no circumstances to use her to carry freight, merchandise or passengers for hire, or to do anything in contravention of its status as a yacht, or to do anything in the sailing or navigating of the same in contravention of the laws of the United States or of any foreign country.

Fourth. That in and by said charter-party said respondent expressly guaranteed and insured the safety of said yacht and agreed to be responsible for its safe delivery to the libellant at the
4 expiration of said charter-party as aforesaid, and to be and become liable and responsible for any and all loss and damage to the hull, machinery, equipment, tackle, spars and furniture belonging or appurtenant to said yacht; and it was also agreed that

the reasonable value of said yacht was $75,000, in case of its loss during the existence of said charter, and that said respondent would procure security or guarantee to and for the libellant in the sum of $75,000 to secure any and all losses and damages which might occur to said yacht or its belongings which might be sustained by the libellant by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of said charter-party.

Fifth. That on or about said 1st day of April, 1898, said respondent, by its said agent Chester S. Lord, pursuant to the terms and provisions of the charter-party aforesaid, executed and delivered to the libellant an agreement of suretyship conditioned that the said respondent would well and faithfully perform and fulfill all and singular the terms and conditions of said charter-party on its part to be kept and performed upon the understanding that the liability thereunder should in no case exceed the sum of $75,000.

Sixth. That on or about said first day of April, 1898, said libellant, by his agent aforesaid, delivered said yacht and appurtenances to said respondent pursuant to the terms and provisions of the charter-party aforesaid; and that thereafter said respondent, at its own expense, put said yacht in commission, made such repairs as were necessary to that end, and assumed the sole control, management and navigation of said yacht and hired the officers, engineers and crew therefor and furnished all necessary provisions, coal and other supplies; and that said yacht thereupon proceeded from the port of New York to the West Indies.

Seventh. That thereafter and prior to the 14th day of May war was declared between the United States of America and the Kingdom of Spain, arising from and by reason of the condition of affairs in the island of Cuba as aforesaid, and on or about said last-mentioned date, and while the said yacht was still in its possession under the terms and provisions of the charter-party above mentioned, the respondent, in order to enable its employees and representatives to observe, so far as practicable, the military and naval operations in the vicinity of said island of Cuba for the purpose of procuring the publication thereof in said newspaper, did on or about the date last above mentioned, through its agent Chester S. Lord, make and conclude at the city of New York with the libellant (who was still the owner of said yacht) through his agent Thomas Manning, a second charter-party bearing date on said day, wherein and whereby the libellant, for and in consideration of the covenants and agreements therein mentioned to be kept and performed by the said respondent, did let the said yacht and appurtenances as aforesaid in the condition that they then were for the term of four months from the 1st day of June, 1898, to and until the 1st day of October, in said year, for the sum of $10,000, which amount was paid by respondent to libellant's said agent on the execution of said charter-party.

Eighth. That said respondent for and in consideration of the covenants and agreements to be kept and performed by the said libellant, chartered and hired the said yacht for the period aforesaid and covenanted and agreed to pay the sum above mentioned to the

libellant or his agent, for such hire, and further covenanted and agreed, among other things, as follows, that is to say:

1. To keep in repair at its own cost and expense said yacht, its hull, tackle, spars, furniture, gear and boats during the continuance of said charter-party.

2. To pay all running expenses of said yacht, including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges during the continuance of said charter-party.

3. To surrender said yacht with all its gear, furniture and
6 tackle at the expiration of the term of said charter-party to said libellant or his agent at Manning's basin, foot of 26th street, South Brooklyn, in the port of New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

4. To use said steam yacht as a yacht only and under no circumstances to use her to carry freight, merchandise or passengers for hire, or to do anything in contravention of its status as a yacht, or to do anything in the sailing or navigating of the same in contravention of the laws of the United States or of any foreign country.

Ninth. That in and by said last-mentioned charter-party said respondent expressly guaranteed and insured the safety of said yacht and agreed to be responsible for its safe delivery to the libellant at the expiration of said charter-party as aforesaid, and to be and become liable and responsible for any and all loss and damage to the hull, machinery, equipment, tackle, spars and furniture belonging or appurtenant to said yacht; and it was also agreed that the reasonable value of said yacht was $75,000, and in case of its loss during the existence of said charter, *and* that said respondent would procure security or guarantee to and for the libellant in the sum of $75,000 to secure any and all losses and damages which might occur to said yacht or its belongings, which might be sustained by the libellant by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of said charter-party.

Tenth. That on or about said 14th day of May, 1898, said respondent, by its said agent, Chester S. Lord, pursuant to the terms and provisions of the charter-party last above-mentioned, executed and delivered to the libellant an agreement of suretyship conditioned that the said respondent would well and faithfully perform and fulfill all and singular the terms and conditions of said charter-party on its part to be kept and performed upon the understanding that the liability thereunder should in no case exceed the sum of $75,000.

7 Eleventh. That soon after the delivery of said yacht to the respondent, on April 1st, 1898, as aforesaid, she proceeded from the port of New York to the West Indies, and thereafter and prior to her loss as hereinafter mentioned said yacht was used, as libellant is informed and believes, for the purpose of enabling the representatives of the respondent and also the representatives of the publishers of various newspapers and other publications in the city

of New York to observe the naval and military operations in the vicinity of the island of Cuba and thereby securing the publication of the information so secured as aforesaid.

Twelfth. That the libellant has always since said 1st day of April, 1898, well and truly performed and kept all and singular the covenants and undertakings on his part according to each of the said charters aforesaid to be performed and kept, but the respondent has not well and truly performed and kept all and singular the covenants and undertakings on its part according to said charter-party of May 14th, 1898, to be performed and kept, in that said respondent has failed and neglected to surrender and deliver said yacht to this libellant or his agent, as provided in said charter-party and in that said yacht while in the charge and control of said respondent, its agents or servants as aforesaid, was wrecked and is a total loss, as libellant is informed and believes.

Thirteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore, the libellant prays that process in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said Sun Printing and Publishing Association and that said company may be required to answer on oath this libel and the matters herein contained, and may be cited to appear and answer such interrogatories as may be propounded to it by the libellant, and that this honorable court will be pleased to decree the payment of the
8 amount so due to the libellant as aforesaid, to wit, the sum of $75,000, with interest from October 1st, 1898, and costs, and that the said Sun Printing and Publishing Association be required to pay the same and that the libellant may have such other and further relief as in law and justice he may be entitled to receive.

WILLIAM L. MOORE.

Sworn to before me this 16th day of November, 1898.

[SEAL.] OWEN FITZSIMMONS,
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. Co.

ZABRISKIE, BURRILL & MURRAY,
Proctors for Libellant.

Interrogatories Propounded to the Respondent, The Sun Printing and Publishing Association, which it is Required to Answer in Writing, under Oath.

First interrogatory. Was the respondent, at the dates mentioned in the foregoing libel, engaged in the business of printing and publishing a daily newspaper in the city of New York, known as the New York Sun? Was it a part of the business of said respondent to procure and publish in said newspaper information and news respecting events and occurrences happening from time to time within the United States and elsewhere? Was it also a part of the busi-

ness of said respondent to employ reporters and other persons for the purpose of procuring such news in various parts of the United States and elsewhere? Was it also a part of the business of said respondent to employ such suitable and requisite means as might be necessary to enable its reporters and representatives to procure such information and news?

Second interrogatory. Have the board of directors of the respondent at any time, either before or after the declaration of war between the United States of America and the Kingdom of Spain, authorized any officer, agent or employee of the respondent to
9 take any steps in regard to the procuring of news or information for publication in said newspaper relative to the condition of affairs in the vicinity of the island of Cuba? If yes, then attach to the answer to this interrogatory a copy of the resolution adopted, or the authority so given. Has the question of the propriety or advisability of sending persons to procure such news or information for publication as aforesaid received consideration at any time as at a meeting of the board of directors of the respondent corporation? If yes, then attach to the answer hereto a copy of such portion of the minutes of such meeting as relate to these matters.

Third interrogatory. What are the names of the various directors and officers of the respondent?

Fourth interrogatory. Have any instructions or directions been given at any time as aforesaid by any officer or director of the respondent to any agent, employee or other officer in reference to the sending of reporters or other representatives of the respondent to obtain news or information for publication in said newspaper, relative to the condition of affairs in the vicinity of the island of Cuba; and if so, state what such instructions or directions were, and by whom and to what officer, agent or employee they were so given.

Fifth interrogatory. At the times mentioned in said libel was Chester S. Lord in the employ of said respondent, and if so, in what capacity? What were the duties of said Lord, and if any such duties were defined in the by-laws or in writing, then attach to the answer hereto a copy of such portion thereof as relates to these matters? What were the powers and duties of said Lord in regard to the procuring of news and information for publication in said newspaper, and to the hiring of reporters and other persons, and the employment of such other means as might be necessary to procure such news and information?

Sixth interrogatory. What instructions or directions did said Chester S. Lord at any time as aforesaid receive from the
10 board of directors or from any officer or agent of the respondent in regard to procuring information or news for publication as aforesaid relative to the condition of affairs in the vicinity of the island of Cuba, or in regard to the sending of reporters or other employees of the respondent to obtain such news or information or in regard to the employment of such suitable and requisite means as might be necessary to enable said reporters and other em-

ployees to procure such news or information? If so, then state from whom were such instructions or directions received?

Seventh interrogatory. What were the respective dates of the checks for $5,000 and $10,000 given to Thomas Manning on or about April 1st and May 14th, 1898, respectively, in payment of the charter moneys reserved by the two charters mentioned in the libel herein? By whom were such checks signed, and what was the signature to the same? Were such checks drawn upon funds belonging to the respondent? In what report or reports, statements of account or financial statements were the amounts of these checks entered? What was the course of business of the respondent in relation to posting entries from the stubs in said check book. Were the entries on the stubs of the two checks above mentioned posted in books of account, and if so, what were the names of such books and what officer of the respondent had charge or supervision thereof?

Eighth interrogatory. What was done by the agents of the respondent in April, 1898, in order to put said yacht *Kanapaha* in commission? Was she put in dry dock, and if so, where? Was she repaired, painted, coaled and provisioned prior to her departure from the port of New York, and if so, what officer or agent of the respondent attended to these matters and gave orders in regard thereto? Were the expenditures so made paid for by checks upon funds of the respondent, and if so, then how and by whom were such checks signed?

Ninth interrogatory. Did the respondent, through its agent or representative, employ the master, officers, engineers and crew of said yacht, and if so, give the name and position of such agent or representative?

11 Tenth interrogatory. Were any reporters employed by the respondent on board of said yacht during any of the time between April 2nd and September 5th, 1898? If so, for how long and what were their duties?

Eleventh interrogatory. Were any reporters or representatives of any newspaper or publication other than the New York Sun on board of said yacht during any of the time between April 2nd, 1898, and September 5th, 1898; if so, during what period of time? What officer or agent of the respondent arranged for the transportation of such representatives of other newspapers or publications? Were payments made to the respondent by such other newspapers or publications for the transportation and privileges aforesaid on said yacht, and if so, to what officer or agent of the respondent were such payments made, and if by check, to whose order were such checks drawn and what officers or agents of the respondent had to do with any of the negotiations leading up to such payment? Did the amount of such payments go to the credit of the respondent in bank?

Twelfth interrogatory. Were any items of information or news furnished by the respondent or any of its officers or agents to any newspaper other than the New York Sun, and if so, was payment made therefor to the respondent? What officer or agent of the respondent had to do with any of the negotiations leading up to the

furnishing of such news or information, or the payment therefor? Was such payment made by check or checks? If so, to whose order were such checks drawn, and did the amount thereof go to the credit of the respondent?

Thirteenth interrogatory. Was said yacht at any time between April 2nd, 1898, and September 5th, 1898, insured by or on behalf of the respondent, and if so, in whose favor was such insurance taken out, and when and for how long a period was such insurance effected? What was the amount of such insurance? What officer or agent of the respondent took out such insurance? Were
12 the premiums paid by funds of the respondent? What were the dates of the payment of such premiums, and if by a check, how and by whom were such checks signed?

Fourteenth interrogatory. Did said Chester S. Lord at any time after April 1st, 1898, inform or make any report to any officer, director or agent of the respondent, or to its board of directors in relation to the chartering of the yacht *Kanapaha*, or in relation to the sending of reporters or other employees of the respondent to obtain news or information for publication in said newspaper relative to the condition of affairs in the vicinity of the island of Cuba? If so, what was the tenor of such information or report, and if in writing, then attach to the answer hereto a copy thereof? Was it a part of the duty of said Lord to make returns or reports from time to time to any officer, director or agent of the respondent as to checks drawn and issued by him, or moneys expended by him on behalf of the respondents? Did said Lord make any return or report subsequent to April 1st, 1898, of any checks drawn and issued by him or moneys expended by him in payment of the charter moneys reserved by the two charters mentioned in said libel or in payment of the expenses incident to putting the yacht *Kanapaha* in commission, or in payment of provisions, coal and other supplies for use on said yacht, or in payment of wages of the master, engineers and crew thereof? If so, how many such reports were made after April 1st, 1898? Were such returns given orally or in writing, and when and to whom were they made respectively? Were such items of expenditure audited and approved by any officer or director or agent of the respondent, and if so by whom, and what are the respective dates of such audit and approval?

Fifteenth interrogatory. Were the items of expenditure mentioned in the last interrogatory included in any report or statement of the treasurer or other financial officer of the respondent, and if so, when and to whom were such reports or statements made? Were they acted upon by any committee appointed by the board of di-
13 rectors or stockholders of the respondent? What was the name of such committee, and what officers or directors of the respondent were members of such committee? What were the duties of such committee, and if these were fixed by the by-laws of the respondent, then attach to the answer hereto a copy of the by-laws relating thereto. How many reports or statements has the treasurer or other financial officer of the respondent made since April 1st, 1898, to any such committee or to the board of directors? When

were such statements and reports made and on what date or dates were they submitted respectively?

Sixteenth interrogatory. Have any of the items of expenditure mentioned in the fourteenth interrogatory been submitted to the board of directors of the respondent, or the executive or other committee appointed by such board, or by the stockholders, or to any officer of the respondent? If so, what action, if any, was taken in regard to the same respectively, and upon what dates were such items so submitted?

Seventeenth interrogatory. Was there any agent or employee of the respondent on board of said yacht between April 1st, 1898, and September 5th, 1898, authorized to expend moneys on behalf of the respondent in payment for provisions, coal, supplies, wages and running expenses? If so, from whom did such agent or employee receive authority to make such payments, and in what manner and by whom were moneys transmitted to him for such purposes? To whom did he report in regard to such payments, and what action if any was taken in regard to such items of expenditure by any officer or committee, or by the board of directors of the respondent?

Dated November 16th, 1898.

ZABRISKIE, BURRILL & MURRAY,
Proctors for Libellant.

(Endorsed:) Libel. Filed Nov. 16, 1898.

14 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The Sun Printing and Publishing Association, a corporation organized and existing under the laws of the State of New York, the respondent named in the libel of William L. Moore against The Sun Printing and Publishing Association in a cause of contract alleged to be in said libel, civil and maritime, answers said libel and complaint as follows:

First. The respondent admits the allegations of the first article of said libel.

Second. The respondent admits that prior to the first day of April, 1898, the inhabitants of the island of Cuba, then owned by the Kingdom of Spain, were and had been in a state of insurrection and rebellion, but it denies that on or about the date aforesaid, or at any other time, the respondent in order to enable its employees or representatives to observe as far as practicable or otherwise, the various incidents or occurrences connected with such rebellion or otherwise, or for the purpose of procuring the publication thereof in the New York Sun or for any other purpose, did make or conclude at the city of New York, through libellant's agent, Thomas Manning, or with any other person, a charter-party with the libellant as set forth in the second article of the libel, and the respondent further denies that it, at any time, made or concluded with the libellant, or with any agent of the libellant, any charter-party whatsoever, either as set forth in the second article of the libel or otherwise.

The respondent admits that an alleged contract was made by one

Chester S. Lord with the libellant herein, but it avers and alleges that the said Chester S. Lord was not the agent of the respondent The Sun Printing and Publishing Association in making or concluding any charter-party with the libellant or with any other person, and that any alleged contract for the hire or employment of the said steam yacht *Kanapaha* made by the said Chester S. Lord
15 was made on his own individual responsibility, and without any right or authority to represent the respondent therein, and that the respondent was not and is not bound by any of the alleged covenants or agreements or conditions or stipulations in the said alleged contract or charter-party.

The respondent admits that the sum of $5,000 was paid by said Chester S. Lord to libellant on the execution of said alleged charter-party, but it avers and alleges that the said payment of the said sum of $5,000 was made by the said Chester S. Lord without any warrant or authority so to make such payment on the part of the respondent corporation, and the respondent denies that said sum of $5,000 was paid by the respondent to the libellant's agent or by its authority.

Third. The respondent denies that for and in consideration of the covenants or agreements to be kept or performed by the said libellant it chartered or hired the said yacht for the period aforesaid or covenanted or agreed to pay any sum to the libellant or his agent for such hire, and it denies that it further covenanted or agreed, among other things, to keep the various agreements or to do the various things set forth in subdivisions 1, 2, 3, 4, and 5 of the third article of the libel herein.

Fourth. The respondent denies that in or by said alleged charter-party, it, the respondent, guaranteed or insured the safety of said yacht or agreed to be responsible for its safe delivery to the libellant at the expiration of said alleged charter-party, or to be or to become liable or responsible for any or all loss or damage to the hull, machinery, equipment, tackle, spars or furniture belonging or appurtenant to said yacht; and it further denies that it, the respondent, also agreed that the reasonable value of said yacht was $75,000, or any other sum whatsoever, in the event of the loss of said yacht during the existence of said alleged charter, or that said respondent would procure security or guarantee to or for the libellant in the sum of $75,000 or in any sum to secure any or all losses or damages which might occur to said yacht or its belongings which might be sustained by the libellant by reason of such loss or damage,
16 or by reason of any breach of any of the terms or conditions of said alleged charter-party.

Fifth. The respondent denies that on or about the 1st day of April, 1898, it, pursuant to the terms and provisions of said alleged charter-party or contract or otherwise, either by Chester S. Lord or any other person, executed or delivered to the libellant an agreement of suretyship or any agreement whatsoever, but it avers that if any agreement of suretyship was made by the said Chester S. Lord, he acted on his own and individual responsibility, and that the said Chester S. Lord was not the agent of this respondent in making said

agreement of suretyship, and he had not been authorized by the respondent to make such agreement of suretyship.

Sixth. The respondent admits that on or about the first day of April, 1898, the libellant delivered his said yacht and appurtenances to certain employees of the respondent, but it denies on information and belief that the yacht or appurtenances was or were so delivered pursuant to the terms or provisions of the said alleged charter-party. And the respondent further admits that it put said yacht in commission, made such repairs as were necessary to that end, and furnished all necessary provisions, coal and other supplies, and that said yacht thereupon proceeded from the port of New York to the West Indies. The respondent denies on information and belief that it assumed the control or navigation of said yacht or hired the officers, engineers or crew therefor, but it avers and alleges on information and belief that Captain Packard assumed the management and navigation of said yacht and hired the officers, engineers and crew therefor.

Seventh. The respondent denies that on or about the 14th day of May or at any time prior thereto or subsequent thereto, in order to enable its employees or representatives to observe the military or naval operations in the vicinity of said island of Cuba for the purpose of procuring the publication thereof in its said newspaper
17 or for any other purpose, it did, through its agent, Chester S. Lord, or through any other person, make or conclude with the libellant a second charter-party or any other charter-party. The respondent avers and alleges that if any alleged second charter-party was made by Chester S. Lord with the libellant, it was made by the said Chester S. Lord on his own individual responsibility and without any right or authority to represent the respondent therein, and that the respondent was not or is not bound by any of the alleged covenants or agreements in said alleged second charter-party mentioned. The respondent admits that the sum of $10,000 was paid thereafter by the said Chester S. Lord to the libellant, but it avers and alleges that the said payment of the said sum of $10,000 was made by the said Chester S. Lord without any warrant or authority so to make such payment on the part of the respondent corporation.

Eighth. The respondent denies that for or in consideration of the covenants or agreements to be kept or performed by the said libellant or otherwise, it chartered or hired the said yacht, or that it covenanted or agreed to pay the sum above mentioned to the libellant or his agent, for such hire or any other hire, or that it covenanted or agreed among other things to do the various things set forth in subdivisions 1, 2, 3 and 4 of the eighth article of this libel.

Ninth. The respondent denies that in or by the said alleged charter-party it, the respondent, expressly guaranteed or insured the safety of said yacht, or that it agreed to do any of the various things set forth in the ninth article of this libel; but it avers and alleges that on the contrary, it, the respondent, made no alleged charter-party or contract with the libellant, but that any alleged charter-party which was made by the said Chester S. Lord with the

libellant or his agent was made by the said Chester S. Lord on his own responsibility, and without any warrant or authority so to do on the part of the respondent corporation or its trustees.

Tenth. The respondent denies that on or about the 14th
18 day of May, 1898, or at any other time, it executed or delivered to the libellant said agreement of suretyship or any other agreement of suretyship on the terms and conditions set forth in the tenth article of this libel, or on any other terms or conditions whatsoever; but it avers and alleges that any alleged agreement of suretyship executed and delivered to the libellant by said Chester S. Lord was executed and delivered by the said Chester S. Lord on his own responsibility, and was executed or delivered without any warrant or authority so to do on the part of the respondent corporation.

Eleventh. The respondent admits that the said yacht did proceed from the port of New York to the West Indies, and was used for the purpose of enabling the representatives of the respondent and also the representatives of other newspapers to observe the naval and military operations in the vicinity of the island of Cuba.

Twelfth. The respondent denies any knowledge or information sufficient to form a belief as to whether the libellant has always since the 1st day of April, 1898, well and truly performed the covenants or undertakings set forth in the said alleged charter-party, and the respondent denies that it has failed to well and truly perform any agreements or covenants on its part by it at any time made with libellant. The respondent admits that the said yacht has not been surrendered or delivered to libellant, and it admits that the said yacht was wrecked and is a total loss.

Thirteenth. The respondent denies that all and singular the premises set forth in the libel herein are true or that they are within the admiralty or maritime jurisdiction of the United States and of this honorable court.

Fourteenth. Further answering and for a further and separate defense the respondent alleges that both of the said alleged contracts or so-called charter-parties alleged to have been made
19 by the said Chester S. Lord with the libellant or his agent, and the alleged agreement of suretyship alleged to have been made by the said Chester S. Lord with the libellant were and each of them was made, executed and delivered by the said Chester S. Lord on his own responsibility and without any warrant or authority so to do on the part of the respondent corporation, The Sun Printing and Publishing Association, or of its board of trustees; that the said alleged charter-parties and the said agreement of suretyship were not authorized by or was any one of them ever authorized by the board of trustees of the respondent, The Sun Printing and Publishing Association, to be made or executed, and that the said Chester S. Lord in the making and execution of said charter-parties or either of them, and in the making of the said agreement of suretyship acted on his own responsibility.

And the respondent further alleges and avers that the said alleged charter-parties and the said alleged contract of suretyship were not

ratified nor was any of them ever ratified or confirmed by the respondent or its board of trustees.

The first alleged charter-party is hereunto annexed, marked Exhibit A, and is made a part of this answer; the second alleged charter-party is hereunto annexed, marked Exhibit B, and is made a part of this answer; the alleged bond or agreement of suretyship is hereunto annexed, marked Exhibit C, and is made a part of this answer.

Fifteenth. Further answering and for a further and separate defense the respondent alleges on information and belief that the only liability on the part of the respondent corporation in or by reason of its user, at any time, of the yacht *Kanapaha* was limited to the fair and just value of such user, and that the full amount of such user had been paid to the libellant prior to the loss of said yacht, and prior to the commencement of this action or suit in admiralty; that the said yacht was lost off the coast of Cuba without any fault or negligence on the part of the respondent or its employees, in time of war through the act of the public enemy or by the act of God or a peril of the sea, and that the respondent was and is not in any way responsible for such loss.

Sixteenth. Further answering and for a further and separate defense to this libel, the respondent avers and alleges on information and belief that it appears on the face of the libel herein that this court of admiralty has no jurisdiction over the subject-matter of this controversy; that this is not a cause or case of admiralty or maritime jurisdiction, but that this action is simply an action on contract brought to recover money damages, and that it is a controversy between citizens and residents of the same State, to wit, the State of New York, and that the so-called charter-parties were not in reality charter-parties but were simply ordinary contracts made between one Thomas Manning and one Chester S. Lord who are not made parties to this controversy.

Seventeenth. Further answering and for a further and separate defense the respondent further avers and alleges on information and belief that this is a case where the common law is competent to give the suitors a remedy, and that the Revised Statutes of the United States provide in section 563 that the district courts shall have jurisdiction as follows: "Eighth. Of all civil cases of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it;" and that even if this be a civil cause of admiralty and maritime jurisdiction, the respondent is entitled to and does object to the jurisdiction of this court because the suitors herein have the right of a common-law remedy and the common law is competent to give it.

Wherefore, the respondent prays that said libel may be dismissed with costs.

FRANKLIN BARTLETT,
Proctor for Respondent, 82 Times Building,
Borough of Manhattan, New York City.

21 SOUTHERN DISTRICT OF NEW YORK, } ss:
County of New York, }

Thomas Hitchcock, being duly sworn, deposes and says that he resides in the city of New York; that he is the secretary of the respondent corporation, The Sun Printing and Publishing Association above named; that he has read the foregoing answer and the same is true to the knowledge of this deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

THOMAS HITCHCOCK.

Sworn to before me this 28th day of December, 1898.

A. H. BRADLEY,
Notary Public, N. Y. Co.

EXHIBIT A.

Memorandum of agreement made and entered into this first day of April, 1898, by and between William L. Moore, of the city of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord, of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore, being the owner of the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of two months from this date expiring on the first of June now next ensuing for the sum of five thousand dollars ($5,000.00) payable on the signing of this agreement.

That the owner hereby agrees to deliver the said yacht in Manning's basin, in South Brooklyn, to the hirer or his representative as it now is with all its gear, tackle and furnishings, as they now are.

22 That the hirer will overhaul and repair and put said yacht in commission at his own expense and from now on until the expiration of this contract will pay all its running expenses including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract to the owner or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same, do anything

in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00) and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinafter provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention.

23 The hirer shall be liable and responsible for any and all loss and damage to hull, equipment, tackle, spars, furniture or the like. —

That the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, tackle, spars, furniture, gear, boats and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
Agent for William L. Moore, Owner.
CHESTER S. LORD,
For the Sun Printing and Publishing Company.

Exhibit B.

Memorandum of agreement made and entered into this 14th day of May, 1898, by and between William L. Moore, of the city of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord, of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore being the owner of the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club, agrees to let and does hereby let, and the hirer agrees to hire and does hereby hire, the said yacht as she is now for the term of four months from the first day of June, expiring on the first day of October now next ensuing, for the sum of ten thousand dollars ($10,000.00) payable on the signing of this agreement.

That the hirer will carry out the provisions of the charter-party made on the first day of April last, and will until the ex-

24 piration of this contract keep said yacht in repair and will pay all its running expenses, including amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges, and will surrender said yacht with all its gear, furniture and tackle, at the expiration of this contract, to the owner, or his agent, at Manning's basin, foot

26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens, or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00) and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention.

The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

That the hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
Agent for Wm. L. Moore.
CHESTER S. LORD,
For Sun Printing and Publishing Association.

EXHIBIT C.

Whereas by agreement or charter-party dated May 14th, 1898, William L. Moore, of the city of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the city of New York, hereinafter called the hirer, the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club, as will more fully and at large appear by a copy of said agreement or charter-party hereunto annexed and hereby made part hereof.

Now, at the request of the said hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged,

We, The Sun Printing and Publishing Company, of the city of

York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship.

First. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

Second. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

26 Third. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000.00).

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of the Sun Printing & Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said company as its act and deed.

[SEAL.]

A. H. BRADLEY,
Notary Public, New York.

The respondent, The Sun Printing & Publishing Association, by Thomas Hitchcock, its secretary, answers to the interrogatories propounded as follows:

First. To the first three sentences or questions contained in the first interrogatory the respondent answers: Yes.

To the last question of the first interrogatory which reads: "Was it also a part of the business of said respondent to employ such suitable and requisite means as might be necessary to enable its reporters and representatives to procure such information and news?" the respondent answers as follows: It was a part of the business of the respondent corporation, The Sun Printing & Publishing Association, to employ such reasonable or requisite means as might be necessary to enable its reporters and representatives to procure information and news, but it was not a part of the business of the managing editor of the Sun, who, at the times set forth

27 in the libel herein, was Chester S. Lord, to make, execute or deliver contracts or alleged charter-parties for the hire of yachts or alleged agreements of suretyship in connection therewith.

Second. To the whole of the second interrogatory the respondent answers: No.

Third. To the third interrogatory the respondent answers: That the names of the officers of the respondent corporation are—president, Paul Dana, secretary Thomas Hitchcock, trustees, Paul Dana, Thomas Hitchcock, William M. Laffan, E. P. Mitchell and Franklin Bartlett.

Fourth. To the fourth interrogatory the respondent answers: No.

Fifth. To the fifth interrogatory the respondent answers: That at the times mentioned in said libel Chester S. Lord was in the employ of the respondent in the capacity of managing editor, and the duties of said Lord were a general oversight over the news columns of the papers. He hired some of the reporters and signed some of the pay-rolls. His particular functions were to see to the making of the paper over night. Such duties are not defined in the by-laws of the board of trustees or in writing. The powers and duties of the said Lord for the purpose of procuring news and information for publication in said newspaper were to make arrangements throughout the United States with local agents for furnishing and transmitting news. He also had the power to buy items of news from any source; and he had some latitude in hiring reporters, but such action was subject to confirmation by the editor-in-chief. The said managing editor Chester S. Lord had no power or authority to make contracts involving any large expenditures of money without due authorization to make such contracts by the board of trustees, and he had no power or authority to make alleged charter-parties or agreements of suretyship.

28 Sixth. To the sixth interrogatory the respondent answers: That the said Chester S. Lord received no instructions or directions from the board of trustees, and the respondent answers on information and belief that no instructions or directions were received by the said Chester S. Lord from any officer or agent of the respondent.

Seventh. To the seventh interrogatory the respondent answers: That the check for $5,000 given to Thomas Manning was dated April 2nd, 1898, and was signed William M. Laffan, manager, per L. O. Macdaniel; and the check for $10,000 given to Thomas Manning was dated May 14th, 1898, and was signed Thomas Hitchcock, secretary—William M. Laffan, manager. These checks were drawn on funds belonging to the respondent. The amounts of these checks were entered in a provisional account which has not yet been finally adjusted. In respect to the question "What was the course of business of the respondent in relation to posting entries from the stubs in said check book?" the respondent answers that the check book was not used in posting entries. The entries on the stubs of the two checks above mentioned were not posted in books of account from the check book.

Eighth. To the eighth interrogatory the respondent answers: That the yacht *Kanapaha* was put in dry dock in Tebo's dock in Brooklyn. She was repaired, painted, coaled and provisioned prior to her departure from the port of New York, and these matters were attended to by Mr. W. J. Chamberlin, a reporter of the Sun, acting

under orders received from the said Chester S. Lord. Some of the expenditures so made were paid for in cash, and others were paid for by check upon funds of the respondent signed William M. Laffan, manager, by L. O. Macdaniel, attorney.

Ninth. To the ninth interrogatory the respondent answers on information and belief: No; that the master of the yacht,
29 Captain Packard, was selected by Mr. Manning, the agent of the libellant, as the master of the yacht, and that the said master, Captain Packard, hired the officers, engineers and crew of said yacht.

Tenth. To the tenth interrogatory the respondent answers: That H. M. Anderson, John R. Spears and W. J. Chamberlin were the names of the reporters employed by the respondent on board the said yacht, intermittently, from April 2nd to September 5th, 1898, and their duties were to transmit news.

Eleventh. To the eleventh interrogatory the respondent answers: That there were reporters or representatives of newspapers other than the New York Sun on board of said yacht during a part of the time between April 2nd, 1898, and September, 1898, to wit, a reporter or representative of Scripps-McRae's League, St. Louis Globe Democrat, New York Press, and Harper's Weekly. The transportation of such reporters or representatives of other newspapers was arranged for by the said Chester S. Lord. Payments were made to the respondent by such other newspapers or publications for said transportation and privileges, and such payments were made by check to the order of the Sun, and the negotiations leading up to such payments were, in the main, made by said Chester S. Lord, but one arrangement was made by Mr. John R. Spears and another arrangement was made by Mr. William M. Laffan. The amount of such payments did go to the credit of the respondent in bank.

Twelfth. To the twelfth interrogatory the respondent answers: That certain items of information or news were furnished by the respondent to the Laffan bureau, and were sold by the Laffan bureau to other newspapers, and payment therefor was made to the Laffan bureau. No officers of the respondent had to do with any of said negotiations or the payment therefor, but Mr. William M. Laffan, the manager of the Sun, conducted some of said negotiations. Some of the payments were made by check, and some of the checks were made payable to the Laffan bureau and some to
30 the Sun, and some payments were made in cash and the amount thereof went to the credit of the Sun.

Thirteenth. To the thirteenth interrogatory the respondent answers on information and belief that said yacht was insured by said Chester S. Lord in April, 1898, but it denies any knowledge or information sufficient to form a belief as to the name in which the said insurance was taken out; and it avers and alleges that any policy of insurance so taken out has never been seen or examined by any officer of the respondent or its board of trustees. The respondent denies any knowledge or information sufficient to form a belief as to the amount of such insurance, but it admits that it re-

ceived a bill for insurance of $60,000 for the term of two months and that the alleged premiums thereon were paid for by the funds of the respondent and by the cashier of the respondent upon the order of the said Chester S. Lord; that the date of the payment of the first premium was May 31st, 1898, the date of the payment of the second premium was July 12th, 1898, and the date of the payment of the third premium was July 12th, 1898, and that the checks given in payment of the said premiums were signed respectively William M. Laffan, manager, per L. O. Macdaniel.

Fourteenth. To the fourteenth interrogatory the respondent answers that the said Chester S. Lord did not make any report to the board of trustees of the respondent in relation to the chartering of the yacht *Kanapaha* or in relation to the sending of reporters or other employees of the respondent to obtain news or information for publication in said newspaper relative to the condition of affairs in the vicinity of the island of Cuba; and it denies on information and belief that he made any report to any officer, director, or agent of the respondent in relation thereto. It was not the duty of the said Lord to make returns or reports from time to time to any officer, director, or agent of the respondent as to checks drawn or issued by him because the said Lord did not draw or issue checks, and it was not a part of the duty of the said Lord to make returns or reports from time to time to any officer, director, or agent of
31 the respondent as to moneys expended by him in behalf of the respondent. The duty of the said Lord was to submit weekly a statement in writing as to the number and amount of checks which were to be drawn in favor of certain reporters or collectors of news. To the other questions in the fourteenth interrogatory of the libel contained the respondent answers: No.

Fifteenth. To the first two questions in the fifteenth interrogatory contained the respondent answers: No. To the remaining questions in said fifteenth interrogatory contained the respondent answers that it has no treasurer and no other financial officer has made any such report to any such committee or to the board of trustees.

Sixteenth. To the sixteenth interrogatory the respondent answers that it has no board of directors and that the items of expenditure mentioned in the fourteenth interrogatory have not been submitted to the board of trustees or to any committee appointed by such board or by the stockholders or to any officer of the respondent.

Seventeenth. To the seventeenth interrogatory the respondent answers on information and belief that for a part of the time between April 1st, 1898, and September 5th, 1898, there was an employee of the respondent named John R. Spears on board said yacht, who was instructed by the said Chester S. Lord to make limited expenditures of money in payment for provisions, coal, supplies, wages and running expenses, and that for another portion of said time there was an employee of the respondent named H. M. Anderson on board said yacht, who was instructed by the said Chester S. Lord to make limited expenditures of money as aforesaid, and that for the balance of said time there was an employee of the respondent named W. J. Chamberlin on board said yacht, who was in-

structed by the said Chester S. Lord to make limited expenditures of money as aforesaid, and that the said employees received such instructions to make such expenditures from the said Chester
32 S. Lord alone. Part of said moneys were put to the credit of John R. Spears by the *the* Sun, upon instructions from Chester S. Lord, at Key West, Florida, part of said moneys was delivered in cash to said Spears and said Chamberlin and said Anderson, by instructions of Chester S. Lord, and part of said moneys were transmitted by cable to the said Spears or to the said Chamberlin or to the said Anderson, at various West Indian ports, by instructions of said Chester S. Lord, and part were paid by drafts drawn by said Spears and said Chamberlin and others upon the Sun. The said reporters of the Sun made no formal report in regard to such expenditures, and no action was taken in regard to such payments or expenditures by any officer or committee or by the board of trustees of the respondent.

THOMAS HITCHCOCK.

Sworn to before me this 28th day of December, 1898.

A. H. BRADLEY,
Notary Public, N. Y. Co.

FRANKLIN BARTLETT,
Proctor for the Respondent.

(Endorsed:) Answer and answer to interrogatories. Filed Dec. 29, 1898.

33 At a stated term of the United States district court, for the southern district of New York, held at the United States post-office building, in the borough of Manhattan, city of New York, on the 14th day of March, 1899.

Present: Hon. Addison Brown, district judge.

WILLIAM L. MOORE
against
SUN PRINTING AND PUBLISHING ASSOCIATION.

The libellant herein having moved for leave to amend his libel, now on the pleadings herein, and the affidavit of J. Archibald Murray, verified March 13th, 1899, and the order to show cause herein dated March 13th, 1899, after hearing J. Archibald Murray, Esq., of counsel for libellant, in support of said motion, and Franklin Bartlett, of counsel for respondent, in opposition thereto.

It is ordered that said motion be and the same hereby is granted without costs, and that said libel be and the same hereby is amended by inserting after the twelfth article a new article, to be numbered the thirteenth article, and by changing the number of the thirteenth article in the original libel to the "fourteenth" article, so that said two articles shall read as follows:

"Thirteenth. That said respondent, its agents and servants, were negligent in the care and management of said yacht after the delivery thereof to said respondent, its agents and servants, while said

yacht was bound on a voyage from Cape Haytian to the port of Havana through the old Bahama channel, and that the wrecking and loss of said yacht were due to the negligence of said
34 respondent, its agents, and servants and those managing said yacht while on the voyage aforesaid, in proceeding at too high a rate of speed, in not having a sufficient outlook, in going upon an improper and dangerous course, in not making due allowance for the influence of the tides and currents, in running said yacht upon a well-known reef located off Canado point upon the northerly shore of the island of Cuba, whereby said yacht was stranded and wrecked as aforesaid; and in not so heeding the location of the land as would have indicated before said stranding the dangerous position of said yacht and would have enabled those in charge of her to avoid said stranding and loss.

Fourteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this honorable court," and—

It is further ordered that the interrogatories annexed to the original libel and respondent's answers thereto stand as the interrogatories to the amended libel and answers to the same.

ADDISON BROWN.

(Endorsed:) Order. Filed March 21, 1899.

35 United States District Court, Southern District of New York.

WILLIAM L. MOORE
vs.
THE SUN PRINTING AND PUBLISHING ASSOCIATION.
} Before Hon. Addison Brown, Judge.

NEW YORK, *April* 14, 1899.

Appearances.

Zabriskie, Burrill & Murray, Esqs. (Mr. Murray), for the libellant; Charles E. Hughes, Esq., of counsel.

Franklin Bartlett, Esq., for respondent.

The claims of the libel and answer are stated.

Mr. HUGHES: We offer in evidence the articles of association of the Evening Telegraph Association filed September 30, 1867, under the laws of the State of New York at the office of the secretary of state.

They are marked Libellant's Exhibit 1.

Mr. HUGHES: We offer in evidence a certified copy of the act of the legislature of the State of New York passed January 24, 1868, changing the name of the Evening Telegraph Association to the Sun Printing and Publishing Association.

It is marked Libellant's Exhibit 2.

Mr. HUGHES: We also offer in evidence the bill of sale of the steam yacht *Kanapaha* from J. Pierrepont Morgan to William L.

Moore, dated October 21, 1891. Acknowledged the same day.

36 Mr. BARTLETT: We admit that at all times set forth in the libel Mr. Moore was owner of the yacht.

Mr. HUGHES: Have you the charter-party of April, 1898, Mr. Bartlett?

The original charter-party is produced by respondent.

Mr. HUGHES: Will the respondent admit that the signatures upon the instrument produced were written by the respective parties, by Thomas Manning and Chester S. Lord?

Mr. BARTLETT: No, we do not admit it.

WILLIAM L. MOORE, being duly sworn and examined as a witness on his own behalf, testifies:

By Mr. HUGHES:

Q. Are you the libellant?
A. Yes, sir.
Q. You reside in New York?
A. Yes, sir.
Q. Do you know Thomas Manning?
A. Yes, sir; very well.
Q. I show you this paper which has been produced and ask you whether that is the handwriting of Thomas Manning?
A. Yes, sir.

Mr. BARTLETT: I object.

Q. Have you seen Mr. Manning write?
A. Yes, sir.
Q. Familiar with his handwriting?
A. Very familiar.
Q. Now look at the signature and tell me whether that is the handwriting of Thomas Manning, the words "Thomas Manning, agent for William L. Moore, owner"?

Mr. BARTLETT: I object.

Preliminary cross by counsel for respondent.

By Mr. BARTLETT:

Q. How many times have you seen him write?
A. Oh, numbers of times; I couldn't tell you how many.

37 Q. You have seen him write often?
A. Oh, yes; very frequently. I have received bills from him, receipts from him. I have seen him write.

By Mr. HUGHES:

Q. In whose handwriting is that?
A. That is Manning's handwriting.
Q. "Thomas Manning, agent for William L. Moore, owner"?
A. He was authorized by me to sign it.

Mr. BARTLETT: I move to strike out the answer as not responsive. Motion denied.

Q. Those words are in Mr. Manning's handwriting, "Thomas Manning, agent for William L. Moore, owner"?
A. Yes.

The charter-party of April, 1898, is marked Libellant's Exhibit 3 for identification.

Counsel for libellant calls for charter-party dated May 14, 1898, and it is produced by respondent.

Q. I show you the paper which has just been produced and ask you whether the words "Thomas Manning, agent for William L. Moore," the superscription to that paper, are in the handwriting of Mr. Thomas Manning.
A. Yes, sir.
Q. Your agent?
A. My agent.
Q. Authorized to sign?
A. Authorized by me to sign that paper.
Q. For you?
A. For me.

The charter-party of May 14, 1898, is marked Libellant's Exhibit 4 for identification.

Mr. HUGHES: I ask for the production of the two agreements of suretyship, dated respectively April 1, 1898, and May 14, 1898.

Respondent's counsel produces the second one called and says he has not the first.

38 Mr. HUGHES: The one dated May 14, 1898, I ask to have marked for identification.

The COURT: Are the signatures to this admitted?

Mr. BARTLETT: No; I don't admit anything.

The agreement of suretyship of May 14, 1898, is marked Libellant's Exhibit 5 for identification.

Mr. BARTLETT: We admit the words "Chester S. Lord" in Exhibit 5 for identification.

Mr. HUGHES: Won't you admit that the additions in ink, "For Sun Printing and Publishing Associ-tion," are also in the handwriting of Chester S. Lord?

Mr. BARTLETT: No; I don't admit it, and I don't think they are. They don't look like the same handwriting to me.

Mr. HUGHES: I offer in evidence the deposition of Olaf Petersen, taken on behalf of libellant in pursuance of the order of the court, dated March 14, 1899. He was ship-keeper on the yacht at the time of her delivery.

The deposition is received subject to all objections to the questions as noted.

United States District Court, Southern District of New York.

WILLIAM L. MOORE
vs.
THE "SUN" PRINTING & PUBLISHING Association.
} Before Thomas Alexander, Esq., Commissioner.

NEW YORK, *March 14th*, 1899.

Appearances.

Messrs. Charles E. Hughes and J. Archibald Murray, for the libellant.

Mr. Franklin Bartlett, for the respondent.

Depositions Taken on Behalf of the Libellant, in Pursuance of an Order of the Court Dated March 14th, 1899.

OLAF PETERSEN, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Examined by Mr. HUGHES:

Q. What is your full name?
A. Olaf Petersen.

Mr. BARTLETT: I want the other witness excluded.
Mr. HUGHES: We have no objection.

Q. Petersen, what is your occupation; what do you do?
A. I am a seaman, sir.
Q. What was your occupation in April, 1898?
A. Seaman, sir; ship-keeper on W. L. Moore's yacht.
40 Q. What was the name of that yacht?
A. *Kanapaha.*
Q. How long had you been ship-keeper on that yacht?
A. Well, anywhere from 1895 to 1898, when she left.
Q. That is, until April, 1898; from 1895 until April, 1898?
A. Yes, sir.
Q. Where was the yacht on the 1st of April, 1898?
A. She was on Manning's dock, 26th street, Brooklyn.
Q. Manning's basin, isn't it?
A. Well, a dock or basin, whatever they call it.
Q. How long had the *Kanapaha* been at Manning's basin before that?

Objected to as immaterial and irrelevant.

A. Well, she used to lie up there every winter.
Q. Did she lay up there in the winter of 1897–1898?
A. Yes, sir.
Q. Had you been keeper during that time?
A. Yes, sir.
Q. Was the yacht in commission during that time?

Objected to as irrelevant and immaterial.

A. No, sir.

Q. How long before the 1st of April, 1898, was it that the *Kanapaha* had been in commission?

Objected to as irrelevant and immaterial.

A. Since 1895, I believe.

Q. Was there any one else on the yacht besides yourself in March, 1898?

A. Just the engineer, Mr. Lewis.

Q. Any one else?

A. No, sir.

Q. And I understand that you had charge of her for Mr. Moore?

A. Well, looking after her, that is all.

Mr. BARTLETT: He hadn't said that yet.

Q. Do you remember delivering the yacht *Kanapaha* to any one on or about the 1st of April, 1898?

A. Well, I received a letter from the agent, Manning.

41 Mr. BARTLETT: Objected to, the contents of the letter, unless it is produced.

Q. All I want to know is whether, on or about April 1st, you delivered the yacht to any one?

Mr. BARTLETT: Objected to as incompetent and improper, and calling for a conclusion. Ask him what he did.

A. To Captain Packard and his men.

Q. Well, what did you do on that day?

A. That day—that was in the afternoon, and we took her over to Tebo's dock.

Q. I mean at the time of the delivery of the yacht what did you do?

A. What did I do?

Q. Did you meet any one? Did you know Captain Packard?

A. I did not, sir.

Q. Did you know Captain Packard before the 1st of April, 1898?

A. No, sir.

Q. Had you ever met him?

A. No, sir.

Q. When did you first meet him?

A. When he came on the yacht.

Q. When was that?

A. The 1st of April.

Q. 1898?

A. 1898.

Q. You mean the yacht *Kanapaha*?

A. Yes, sir.

Q. And where was the yacht at that time?

A. Manning's dock.

Q. Where did you meet Captain Packard on that day?

A. On board the yacht *Kanapaha*.
Q. What did he say to you?

Objected to as irrelevant, immaterial, incompetent and improper.

A. Well, I asked him if he was the captain of the boat, and he says yes.
Q. Did he have a letter?
A. Yes, sir.
Q. Did he show you the letter?
A. Yes, sir; he gave me a letter.
Q. Have you got that letter here?
A. Yes, sir.
42 Q. Will you please produce it?
A. Yes, sir. (Witness produces letter.)
Q. Is that the letter that you now produce?
A. That is the letter I received from Captain Packard.
Q. And when did you receive it?
A. In the evening when he came on board.
Q. That is on April 1st, 1898?
A. Yes, sir.

Letter offered in evidence.

Mr. BARTLETT: Objected to as incompetent, irrelevant and immaterial, on the ground that the signature has not been proven, and on the special ground that we cannot be bound by any letter alleged to have been written by the plaintiff Moore, or his alleged agent, Manning.

Letter marked Exhibit "1," of March 14th, 1899.

Q. Did you receive any other letter or telegram that day?
A. Yes, sir.
Q. What did you receive?
A. A telegram.
Q. Have you got that telegram?
A. Yes, sir.
Q. Will you please produce it?
A. Yes, sir. (Witness produces telegram.)
Q. Is this the telegram that you received that you now hand me?
A. Yes, sir; the telegram I received from the owner of the yacht. It is his name to it, anyway.

Mr. BARTLETT: I move to strike out the voluntary statement of the witness that he received it from the owner, and that the owner's name was on it, as irresponsive, incompetent, irrelevant and immaterial.

Q. On what day did you receive this telegram?
A. The 1st of April, 1898, in the evening.
Q. In the evening, April 1st, 1898?
A. Yes, sir; I couldn't tell what hour.

Telegram offered in evidence.

43 Mr. BARTLETT: Objected to as incompetent, improper, irrelevant and immaterial, as not duly proven, not the best evidence of the telegram, not being the dispatch alleged to have been sent or the original.

Telegram marked Exhibit "2," of March 14th, 1899.

Q. Which did you receive first, this telegram which has been marked Exhibit "2" of this date, or the letter which has been marked Exhibit "1"?

A. The letter.

Q. From Captain Packard?

A. Yes, sir.

Q. And then later you got the telegram?

A. Yes, sir.

Q. How long after?

A. I couldn't tell; can't recollect it.

Q. What time in the afternoon was it that Captain Packard came to the yacht *Kanapaha* on April 1st, 1898?

A. The hour I couldn't tell, but it was late in the afternoon.

Q. Well, when you say late, how late do you mean?

A. After four o'clock, anyhow.

Q. What time was it, as nearly as you can remember, that you received the telegram?

A. Well, I couldn't tell for sure.

Q. Well, your best memory.

A. Well, that isn't well to say, my best memory.

Q. Did any one come to the yacht on that day with Captain Packard?

A. Yes, sir; he had two with him.

Q. Do you remember the name of either of those men?

A. I didn't know the name, but I heard the name later on.

Q. Well, you met one of them some time after frequently?

A. Well, he came on the yacht.

Q. What was his name?

A. Anderson.

Q. Well, after Captain Packard handed you this letter which has been marked Exhibit "1"—have you got the envelope that that letter came in?

A. No, sir.

Q. Have you got the envelope that this telegram came in?

A. I have sir. (Witness produces envelope.)

Envelope offered in evidence.

44 Mr. BARTLETT: Objected to as incompetent, and as not being the best evidence.

Envelope marked Exhibit "3," of March 14th, 1899.

Q. After Packard handed you this letter which has been marked Exhibit "1" what did you do; what did he say to you, and what did you say to him?

A. I can't recollect all that. He said he was the captain.

Q. Did he ask for the yacht?

Mr. BARTLETT: I object to your leading the witness.

Q. Did he say anything about the yacht?

A. He said he had hired the yacht. He said he was the captain——

Mr. BARTLETT: Objected to as incompetent, improper and irrelevant.

The WITNESS (continuing): He said he was the captain, and then I asked him if I could have a situation with him, and he said yes.

Q. Do you remember whether you said anything to him about letting him have the yacht?

A. I didn't say nothing to him; he said to the other——

Mr. BARTLETT: Well, don't answer that.

Q. Did you say anything to Captain Packard about letting him have the yacht?

A. He sent his men down to take the yacht, and I told him he couldn't have the yacht before I had an order from the owner.

Mr. BARTLETT: I move to strike out this testimony as irresponsive, incompetent and irrelevant.

Q. To whom did he say that?

A. To Captain Packard's men.

Q. Do you remember who they were?

A. I don't know all their names.

Q. Was that the time when Packard came down himself?

A. He came down soon after.

Q. Well, first men came there and asked for the yacht
45 and said they were Captain Packard's men?

A. Yes, sir.

Q. And afterwards Captain Packard came down and gave you this letter? Is that so?

A. After I didn't let the yacht go I was called up in the office on the dock on the telephone.

Q. You called up what office?

A. I was called up. By the little office on the dock there there is a telephone, and I was told by Manning's men Manning wished to see me, and he spoke to me.

Mr. BARTLETT: I object to any conversation over the telephone as incompetent, irrelevant, and immaterial.

The WITNESS (continuing): Well, he asked me if I was the man in charge of the *Kanapaha*.

Q. Who asked that?

A. The man who spoke to me on the telephone. First the man on the dock told me Manning wished to see me, he was on the telephone, and he asked me through the telephone if I was the man in charge. Of course he talked a lot. I don't recollect it; I didn't understand all of it.

Q. After you came away from the telephone what did you do?

A. I went on the yacht again.

Q. Was that before Captain Packard came there?
A. Yes, sir.
Q. Well, that was in the evening, did Captain Packard take the yacht?
A. I couldn't tell the hour; impossible.
Q. Well, was it before or after you received this telegram, Exhibit "2"?
A. Well, of course Manning told me through the telephone he was responsible, I could let the yacht go.
Q. To whom?
A. Captain Packard and his men.
Q. You remember letting Captain Packard have the yacht before, or was it after you got this telegram, Exhibit "2"?
A. The yacht was hauled out of the basin, and he was going over to Tebo's dock.
Q. And you were aboard?
A. Yes, sir.
Q. And Captain Packard was aboard?
A. He came aboard at Tebo's.
46 Q. Then the yacht was taken out of the basin with you aboard?
A. Yes, sir.
Q. And Captain Packard was not aboard?
A. No, sir; his men were.
Q. Was Mr. Anderson aboard?
A. No, sir.
Q. And where was the yacht taken?
A. To Tebo's dock.
Q. Where is Tebo's dock?
A. 23rd street.
Q. New York?
A. Brooklyn.
Q. Was that on this same evening, April 1st, 1898?
A. Yes, sir.
Q. When did Captain Packard get on the yacht?
A. At Tebo's.
Q. How late was that in the evening?
A. I know it was dark.
Q. You say you asked Captain Packard if you could have a situation?
A. Yes, sir.
Q. When did you ask him that?
A. When he came aboard.
Q. At Tebo's dock?
A. Yes, sir.
Q. What kind of a situation did he give you?
A. Seaman.
Q. Deck hand on the yacht?
A. Yes, sir.
Q. How long after that did you remain on the yacht?

Mr. BARTLETT: Don't you know without looking at that book? (Witness having referred to memorandum.)

A. The 12th of June.

Q. Well, you remained on the yacht that night of April 1st?

A. Yes, sir.

Q. And you were on the yacht the next day?

A. Well, I asked the captain for liberty for a couple of hours.

Q. What captain, Captain Packard?

A. Captain Packard.

Q. That was on April 2nd?

A. Yes, sir.

Q. Did he give it to you?

A. Yes, sir.

Q. And you were away from the yacht for how long?

A. Two and a half hours, I guess.

47 Q. With that exception you were on the yacht right along?

A. Yes, sir; after that.

Q. And were you on the yacht on the night of April 2nd?

A. Yes, sir.

Q. And also on the next day, April 3rd?

A. I believe we left the dock for sea that day.

Q. You were on the boat when it left; you went away with her?

A. Yes, sir.

Q. When was the yacht put into commission; when was the yacht made ready to go away?

A. She was ready by the 2nd, he told me.

Q. Do you remember whether she left in the night or day time?

A. Night.

Q. Wasn't it the night after the night when you first met Captain Packard, the night after?

A. I can't remember.

Q. How many men were on the yacht when she went away?

A. All that I can't recollect.

Q. Was there a captain?

A. Yes, sir.

Q. Who was he?

A. Captain Packard.

Q. A first mate?

A. Yes, sir.

Q. What was his name?

A. Seamans.

Q. Were there deck hands?

A. Yes, sir.

Q. How many?

A. Four.

Q. And you were one of the four?

A. I was one of the four.

Q. And was anybody else on the yacht besides the captain and the mate and the deck hands when she went away?

A. The engine-room department.

Q. And who were in that?

A. The engineer and his men.
Q. Who was the engineer?
A. Davis.
Q. And how many men did he have?
A. Never counted them, sir.
Q. *One or two?*
A. More than that.
Q. About how many?
A. I don't say, because I never counted.
Q. Was there anybody else on board besides the crew?
A. One, sir.
48 Q. Who was he?
A. Mr. Anderson.
Q. The same man who came down with Captain Packard?
A. Yes, sir.
Q. On the evening of the 1st?
A. Yes, sir.
Q. Give me your best memory how long after that evening of April 1st it was that the yacht *Kanapaha* left?
A. That is no use saying.
Q. Was it within a day or two?
A. Two, I believe. I believe she left between the night of the 2nd and the 3rd.
Q. Between the 2nd and 3rd of April, 1898. You know it was less than three or four days, don't you. You know that the yacht did not leave more than two days after the first of April?
A. Well, about two; I couldn't tell for sure.
Q. Were any of these men that were on the yacht when she left, whom you have mentioned, on the yacht before April 1st, 1898, except yourself?
A. No, sir.
Q. And who got the yacht ready to go away?
A. Captain Packard.
Q. That was the day after the day you let him have the boat?
A. Yes, sir.
Q. Was Mr. Anderson on the yacht the night she lay at Tebo's dock?
A. I couldn't tell for sure.
Q. How long did he stay on the yacht after he went aboard of her at Manning's dock?
A. That night?
Q. Yes.
A. Well, now, I was working and I didn't look at everything.
Q. Well, he was there that night for some time?
A. Yes, sir.
Q. Was he there the next day?
A. Well, then I was around working.
Q. Well, you saw him there from time to time the next day, didn't you?
A. I couldn't tell.

Q. You remember provisions being brought to the yacht?
A. Yes, sir.
Q. And coal?
A. Yes, sir.
Q. When was that done?
A. Took the coal in the night we left from the dock.
49 Q. And did you take provisions in that day?
A. Yes; the provisions was brought down the dock.
Q. When did they commence to put provisions on the yacht?
A. I can't recollect that.
Q. Was it the next morning?
A. We had to get the boat in readiness first.
Q. You remember it was done the next morning, don't you, after you left Manning's basin?
A. It was done some time.
Q. Some time the next morning, wasn't it?

Mr. BARTLETT: I object to this form of examination, leading the witness.

Q. Wasn't it some time the next day after you left Manning's basin?
A. I believe it was, sir.
Q. And you commenced in the morning, didn't you?
A. We commenced on the yacht; getting her ready.
Q. Was the yacht in dry dock?
A. Yes, sir.
Q. When was she got into dry dock?
A. The morning after.
Q. The morning after you left Manning's basin?
A. Yes, sir.
Q. And how long was she in dry dock?
A. Well, just before dinner or after dinner, I can't tell.
Q. Of the same day?
A. Yes, sir.
Q. After she came out of dry dock what was done?
A. Making her fast to the dock, of course.
Q. And then did they put provisions aboard her?
A. The coal went on board; everything had to come up; everything came on board.
Q. And who attended to that?
A. The mate, he was around.
Q. That was Seamans?
A. Yes, sir, he was Seamans.
Q. Had he ever been on the yacht before?
A. Not that I know of.
Q. Anybody else attending to it, to putting stuff on the yacht to make her ready?
A. The men, of course, four seamen.
50 Q. Was Captain Packard there?
A. Came around once in a while, sir.
Q. Did you see Mr. Anderson from time to time?

A. No, sir, I can't recollect seeing him.
Q. I think you have said that Mr. Anderson went away with you when you started on the voyage?
A. Certainly he went away with us.
Q. Where did you go to first?
A. I hears talk that we were bound to Charleston.

Mr. BARTLETT: Objected to as incompetent, irrelevant and immaterial.

Q. Where did you put in first?
A. Cape Lookout.
Q. When did you get to Cape Lookout, about how long after you left New York?
A. I couldn't tell.
Q. Where did you go from there?
A. We went somewhere around there for coal; I don't know the place.
Q. And where did you go from there?
A. Charleston.
Q. From there?
A. Key West; all over; I believe we reached Key West that time.
Q. Had anybody else come on board her before you got to Key West?
A. Not that I know of.
Q. Did anybody come on board the boat at Key West?
A. I seen three more there.
Q. Do you know the names of any of them?
A. Yes, sir, one.
Q. What is his name?
A. Speers.
Q. How long did Mr. Speers stay on board the yacht after he came on board at Key West?
A. He stayed there for some time.
Q. Well, for how long about?
A. That is hard for me to tell.
Q. Several weeks?
A. Oh, yes, several weeks.
Q. What was his first name; what did you call him?
A. Mr. Speers.
51 Q. Do you remember his first name?
A. I do not, sir.
Q. How was he known on the boat?
A. He went by the name of commodore.
Q. Where did you go from Key West?

Mr. BARTLETT: I move to strike that out.

A. Went out to the fleet.
Q. Do you remember the *Buena Ventura?*
A. Yes, sir.
Q. Was that a vessel?

A. A steamer.
Q. When did you see that steamer?
A. We saw her coming in against the fleet.
Q. Did you see her captured; was the yacht there when she was captured?
A. Yes, sir; she was along with the fleet.
Q. Do you remember where the yacht went after the capture of the *Buena Ventura?*
A. Back to Key West.
Q. Where did you go then after leaving Key West?
A. Back after the fleet again.
Q. Do you remember the blockade of Havana?
A. I do, sir.
Q. Was the yacht at that place?
A. She was around the ships there.
Q. Do you remember whether she went to Havana the first day of the blockade?
A. I do not, sir.
Q. You remember she was going with the fleet?
A. She was going around the coast of Cuba.
Q. Do you remember the *Mayflower?*
A. I do, sir.
Q. What was the *Mayflower?*
A. A cruiser.
Q. You remember falling in with the *Mayflower*, do you?
A. I seen her.
Q. You were on the yacht all the time, weren't you; you did not leave the yacht?
A. No, sir; not until the 12th of June.
Q. Well, you say you were around the coast of Cuba. Do you remember going to Cape Haitien?
A. I do, sir; I remember the day.
52 Q. Do you remember what you did there?
A. Coaled up.
Q. Do you remember where you went after leaving there?
A. After the fleet again.
Q. When you say the fleet, what do you mean, the United States fleet?
A. Certainly.
Q. The warships?
A. Yes, sir.
Q. Were you off Santiago?
A. Once I recollect we were there when I was on her.
Q. What other places do you remember touching at?
A. St. Thomas.
Q. Any other place?
A. Kingston.
Q. Kingston, Jamaica?
A. Yes, sir.
Q. And you remember how long it was before you left the yacht

when she touched at Kingston did you go; you left the yacht on the 12th of June, 1898?

A. Yes, sir.

Q. How many days before that about did the yacht go to Kingston?

A. It wasn't many days.

Q. During all this time that you were on the yacht, beginning with the 1st of April to the 12th of June, was Mr. Anderson on board?

A. From the 1st of April to the 12th of June.

Q. Was Mr. Anderson on board all the while?

A. All the while, as far as I know.

Q. You saw him on board a good deal of the while, didn't you?

A. Yes, sir.

Q. Met him every day, didn't you?

A. Well, he might have been out.

Q. And Mr. Speers came on at Key West?

A. I believe he did.

Q. And did he remain on the yacht until you left on the 12th of June?

A. No, sir.

Q. How long did he stay on board?

A. I can't tell the date; he left, but I didn't stay long after him.

Q. Do I understand you to mean that he left a few days before you did?

A. Yes, sir.

Q. But not very long before?

A. Yes, sir.

53 Q. When the yacht was cruising about with the fleet did you put into Key West from time to time?

A. Yes, sir.

Q. What was done at Key West, did you tie up at a dock, or was a boat sent ashore?

A. We put in for coal.

Q. Did you ever see Mr. Anderson go ashore with papers?

A. I don't know what he had in his pocket.

Q. Do you remember after the *Buena Ventura* was captured you were going back to Key West?

A. Yes, sir.

Q. Did Mr. Anderson go off the boat at that time?

A. Yes, sir.

Q. How?

A. In a rowboat.

Q. Who rowed the boat?

A. I did.

Q. What did he say to you?

A. He didn't say anything; told me to take the first landing, and I put him alongside a dock.

Q. And he came back after a little while?

A. Yes, sir.

Q. And you took him back to the yacht?

A. Yes, sir.
Q. Did you see Mr. Spears once in a while leave the boat?
A. Yes, sir; he would go aboard the warships.
Q. Do you remember being hailed by any of the ships of the fleet?
A. Can't remember that.
Q. You remember some time being called to by some cruiser or ship?
A. No, sir; I am not sure; I would not say I recollect it.
Q. What was the speed of the yacht?
A. Well, I was told only from the mate of Captain Seamans; I don't know it; I never kept the navigation of the boat.
Q. Did you hear Mr. Seamans say anything about it?

Mr. BARTLETT: Objected to as incompetent, immaterial, irrelevant and improper.

A. Well, he told me that the best was thirteen.
Q. Thirteen knots?
A. Yes, sir.
Q. How long did Captain Packard remain on the boat, the yacht *Kanapaha?*
A. Can't tell for sure.
Q. You remember that he left before you did?
A. Yes, sir.
54 Q. Who took command of the yacht when Captain Packard left?
A. Seamans.
Q. And did he remain in command—how long did he remain in command?
A. He was in command when I left.
Q. Do you recognize any man in the room here as men who were on the yacht?
A. I couldn't tell for sure, and I won't say nothing.
Q. Do you see any one here that according to your best memory you saw on the yacht?
A. Wouldn't say for sure; it is hard to tell.
Q. Do you think so?
A. Well, thinking is no use.
Q. When I say think, I mean what your best recollection is, your best memory is?
A. Well, I told you there is no use.
Q. Well, this gentleman who sits next to Mr. Bartlett, do you remember ever seeing him before?
A. I couldn't tell for sure.
Q. Do you remember hearing Mr. Speers saying anything to the captain in regard to the handling of the boat?
A. Handling?
Q. Well, sails, and what should be done?
A. Not but very little.
Q. Well, what did you hear?

A. Well, it was only one day he talked about getting more sail for the boat.

Q. Who do you mean, Mr. Speers?

A. Yes, sir.

Q. And to whom did he say this?

A. Either the captain or mate.

Q. What did he say?

A. That he should have another sail on between the two masts. Whether it was done I don't know.

Cross-examination by Mr. BARTLETT:

Q. Are you going to leave this port?

A. I got to leave as soon as I am through here.

Q. On what vessel are you going?

A. I couldn't tell.

Q. Have you been engaged to leave New York?

A. No, sir.

Q. Have you any engagement now to leave this port?

A. No, sir.

55 Mr. BARTLETT: I shall ask the court to take notice of this.

By Mr. HUGHES:

Q. You intended to leave New York today if you could?

A. If I could get the situation.

By Mr. BARTLETT:

Q. Have you any engagement now to leave the port of New York?

A. No, sir, but I expected to.

Q. Did you have any engagement yesterday or today to leave the port of New York today?

A. No, sir.

By Mr. HUGHES:

Q. Didn't you expect to leave today?

A. Well, in one way. I should be down to see the captain of the boat. He said he wasn't going to leave the port yet.

Q. You told Mr. Murray that you were going away on the 15th?

A. Yes, sir; then he said he was going to leave.

Q. Who?

A. The fishing-boat.

Q. That you intended to go on?

A. Yes, sir.

Q. And you intend to go down now, as soon as you are through here, and look after it?

A. Yes, sir.

Q. And you do not intend to stay in New York any longer?

A. No, sir.

By Mr. BARTLETT:

Q. But in point of fact have you any engagement to leave on any ship, or on any boat, or any fishing-boat now?
A. Engagement? I don't know what it means.
Q. Well, have you been hired to go on any boat?
A. No, sir.
Q. Had you been hired yesterday to go on any boat?
A. I was told to come back again.
Q. By whom?
A. The captain of the smack.
Q. What smack?
A. The *Mascot*. He told me to come back last Saturday.
Q. Where was his boat then?
A. Tebo's dock,
Q. Did you go back?
A. I went back Saturday, but didn't meet him.
56 Q. Then yesterday you had not been hired by any one?
A. No; yesterday I didn't meet him.
Q. Well, up to the present no one has hired you?
A. No, sir.

By Mr. HUGHES:

Q. You are now looking for a place on a boat, are you not, to leave this port?
A. Yes, sir.
Q. And you are going just as soon as you can?
A. Yes, sir.
Q. And except for the signing of this deposition you would go this afternoon?
A. Yes, sir.

By Mr. BARTLETT:

Q. But you don't know of any place you can get?
A. I don't know for sure.
Q. The place you are looking for is as able seaman?
A. Yes, sir.
Q. How did you come to testify here today?
A. This gentleman here asked me.
Q. How did you know Mr. Murray?
A. I received a letter from Mr. Moore.
Q. Mr. Moore wrote you?
A. Yes, sir.
Q. To come to Mr. Moore's office?
A. Yes, sir.
Q. Where did they send this letter to?
A. To where I live.
Q. Where do you live?
A. Brooklyn.
Q. What part?
A. President street.

Q. What number?
A. 11.
Q. Mr. Moore wrote to you?
A. Yes, sir.
Q. Did he say what he wanted of you?

Mr. HUGHES: I object, unless the letter is produced; no notice to produce the letter has been given.

A. He told me to come to see him, that is all.
Q. Who?
A. Mr. Murray.
Q. Mr. Moore told you to go to see Mr. Murray?

Mr. HUGHES: Same objection.

57 The WITNESS: Well, I will show it to you. (Produces letter.)
Q. Is this the letter you received?
A. Yes, sir.

Mr. BARTLETT: I offer it in evidence.
Marked Exhibit "4" of March 14th, 1899.

By Mr. HUGHES:

Q. You were subpœnaed, were you not; you got a subpœna to come here?
A. Yes, sir.
Q. Will you produce it, please?
A. I haven't got it.
Q. You remember you got a subpœna?
A. Yes, sir; I got a subpœna.

The WITNESS: Here it is. (Produces subpœna.)
Subpœna offered in evidence, and marked Exhibit "5," of March 14th, 1899.

Q. When was that given to you?
A. Last night, sir.
Q. This letter you have produced, marked Exhibit "4," is the only letter you have received about your testimony, isn't it?
A. Yes, sir.
Q. You said you got the letter from Mr. Moore, you meant it was from Mr. Murray?
A. Yes, sir.
Q. That is the only letter?
A. Yes, sir.

EXHIBIT 1—March 15, 1899.

Manning's Yacht Agency.

NEW YORK, *April* 1, 1898.

Man in charge yacht *Kanapaha*, Manning's basin, foot 26th St., So. Brooklyn, N. Y.

DEAR SIR: Please deliver immediately to the bearer, Capt. Packard, the steam yacht *Kanapaha*, with all her equipment; the yacht is chartered, and Capt. Packard represents the hirers.

Yours very truly, THOMAS MANNING,
Agent for Wm. L. Moore, Owner.

58 EXHIBIT 2—March 15, 1899.

Blank of the Western Union Telegraph Company.

Received at 703 Third Ave., cor. 22nd St.

APRIL 1, 1898.

Dated West Phila., Pa.

To Yacht *Kanapaha*, foot 26 St., B'klyn:

Yacht chartered Manning's orders will be obeyed has full authority.

W. L. MOORE.

EXHIBIT 3—March 15, 1899.

Envelope of Western Union Telegraph Co.

703 Third Ave., cor. 22nd St.

YACHT KANAPAHA,
Foot 26th St., Brooklyn.

EXHIBIT 4—March 15.

MARCH 4TH, 1899.

Mr. Olaf Petersen, Riecken's hotel, 13 President street, Brooklyn, N. Y.

DEAR SIR: Dr. William L. Moore wishes you to call and see me at the earliest opportunity in reference to the *Kanapaha*. Please bring with you any papers you may have relating to the delivery of the yacht to the New York Sun or to your subsequent employment on the yacht.

Yours truly, J. ARCHIBALD MURRAY.

59 EXHIBIT 5—March 15, 1899.

By virtue of a writ of subpœna, to you directed and herewith shown, you are commanded and firmly enjoined, that laying all other matters aside and notwithstanding any excuse, you be and

appear in your proper person before the judge of the district court of the United States of America for the southern district of New York, at a stated term of said court, to be held at the United States court-rooms in the U. S. court and post-office building in the city of New York in and for the said southern district, on the 14th day of March, 1899, at 11 o'clock in the forenoon of the same day, to testify all and everything which you may know in a certain cause now depending undetermined in the said court, then and there to be tried between William L. Moore, libellant, and Sun Printing and Publishing Association, respondent, on the part of the libellant. And this you are not to omit under the penalty of two hundred and fifty dollars.

Dated this 6th day of March, 1899.

By the court:

SAM'L H. LYMAN, *Clerk.*

To Olaf Peterson.

LEONARD O. MACDANIEL, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. Where do you reside?

A. Boonton, New Jersey.

Q. What is your occupation?

A. I am clerk in the employ of the Sun.

Q. The Sun Printing and Publishing Association, the respondent in this action?

A. Yes, sir.

Q. How long have you been so employed?

A. Nine years and odd.

60 Q. In what department of the Sun are you employed?

A. In the cashier's department particularly.

Q. How long have you been employed in the cashier's department?

A. Nine years, since I have been there.

Q. Who is the cashier?

A. I am.

Q. How long have you been cashier?

A. Nine years and some months.

Q. Do you draw checks upon the funds of the Sun, or sign checks drawn upon the funds of the Sun?

A. I make out some checks and I have power of attorney on special account.

Q. Do you from time to time sign checks drawn on the accounts of the Sun?

A. No; literally no.

Q. Don't you ever?

A. Not on account of the Sun strictly speaking.

Q. On the funds of the Sun in bank to the credit of the Sun?

A. I draw upon the account called manager account; I have power of attorney from W. M. Laffan, manager.

Q. Is he business manager of the Sun?
A. His title is general manager.
Q. How long has he been such?
A. Prior to me.

By the COURT:

Q. The fund you draw upon is known as the manager's fund?
A. Manager account.

By Mr. HUGHES:

Q. Do I understand that there is a bank account kept by the Sun in the name of William M. Laffan, manager?
A. Yes.
Q. And that you from time to time sign checks drawn upon that account?
A. Yes, sir.
Q. Do you from time to time endorse checks for deposit to that account or are funds transferred to that account by the Sun?
A. Both.
Q. I would like to have produced the check dated on or about April 1st, 1898, for $5,000 to the order of Thomas Manning, signed "Wm. M. Laffan, manager, per L. O. Macdaniel." Have you such a check here?
A. I believe so.
61 Q. And you also have a check for $10,000, dated on or about May 14, 1898, signed "Thomas Hitchcock, secretary, William M. Laffan, manager, to the order of Thomas Manning"?
A. I think the event will prove it is there.
Q. Will you kindly produce it?

Mr. BARTLETT: I object to the admission of the first check.

A. (The witness produces the check.)
Q. In this check you now hand me, dated April 2, 1898, to the order of Thomas Manning for $5,000, signed "William M. Laffan, manager, by L. O. Macdaniel," that signature, "W. M. Laffan," is stamped, is it not?

Mr. BARTLETT: It is not proper to read the check until it is offered in evidence.

Q. Is this signature "W. M. Laffan," or that part of it, stamped?
A. That is stamped.
Q. And the handwriting below, "L. A. Macdaniel," is in your handwriting?
A. It is.
Q. And you drew that check on that day?

Objected to unless the check is offered in evidence.

Q. Or signed that check on that day?

Objected to unless the check is offered in evidence.

62 LIBELLANT'S EXHIBIT No. 6.

The Sun.

No. 37951. NEW YORK, *Apr.* 2, 1898.

National Broadway bank,

Pay to Thos. Manning or order five thousand 00/00 dollars.

$5,000.

W. M. LAFFAN,
Manager,
P'r L. O. MACDANIEL.

Certification on Face of Check.

National Broadway bank. Certified April 2, 1898.
Payable only through New York clearing-house.

Pay to the Corn Exchange bank, New York, or order.
THOMAS MANNING,
P'r T. ST. J.

Received payment through the New York clearing-house.
April 2, 1898.

Endorsement guaranteed.
CORN EXCHANGE BANK.
LOFTIN LOVE, *Cashier*.

63 LIBELLANT'S EXHIBIT No. 7.

The Sun.

No. 23161. $10,000. NEW YORK, *May* 14, 1898.

National Broadway bank,

Pay to the order of Thomas Manning ten thousand dollars.

W. M. LAFFAN, *Manager.*

THOMAS HITCHCOCK, *Secretary.*

Pay to the Corn Exchange bank, New York, or order.
THOMAS MANNING,
P'r T. ST. J.

Received payment through the New York clearing-house.
May 16, 1898.

Endorsement guaranteed.
CORN EXCHANGE BANK,
NEW YORK.
LOFTIN LOVE, *Cashier.*

A. I did.
Q. To whom did you deliver it?
A. Chester S. Lord.

Mr. HUGHES: I offer the check in evidence.
Objected to as incompetent, irrelevant and immaterial; and on the special ground that whatever took place under the
64 charter-party, which had expired long prior to the loss of the vessel, is irrelevant.
The COURT: I think this is practically a continuous thing. I will admit it.
Mr. BARTLETT: We except.
The check is marked Libellant's Exhibit No. 6.

Q. You have another check there for $10,000, dated May 14, 1898, have you not? The one I called for?
A. (The witness produces the check.)

Q. I show you the signature and ask you in whose handwriting it is. You have seen Mr. Laffan write?

A. I have.

Q. You are familiar with his handwriting?

A. I am.

Q. In whose handwriting is the signature before the word "manager"?

A. Apparently that of W. M. Laffan.

Q. Have you seen Mr. Hitchcock write?

A. I have.

Q. And you are familiar with his handwriting?

A. I am.

Q. In whose handwriting is the signature "Thomas Hitchcock" before the word "secretary"?

A. Evidently Thomas Hitchcock's.

Q. Secretary of the Sun?

A. Yes, sir.

Q. Mr. Laffan, manager of the Sun, is the one in whose handwriting the other signature is?

A. Yes.

Q. Did you see that check at the time it was drawn?

A. I did not.

The second check is offered in evidence.

It is marked Libellant's Exhibit No. 7.

Mr. HUGHES: Exhibit No. 6 reads as follows: On the margin transversely "The Sun." Then "No. 37951" on the left hand. On the right hand "New York, Apr. 2, 1898." Below "National Broadway bank." Below "Pay to Thos. Manning or order five thousand 00/00." Below on the left "$5,000," signed on the right "W. M. Laffan p'r L. O. Macdaniel;" the word "manager" midway between the two signatures.

65 Mr. BARTLETT: You should not say "signed" because "W. M. Laffan" is stamped and "L. O. Macdaniel" is in ink.

Mr. HUGHES: There is also stamped on the face of the check "National Broadway bank; certified April 2, 1898. Payable only through New York clearing-house."

There is endorsed on the check "Pay to the Corn Exchange bank, New York, or order. Thomas Manning p'r T. St. J." And below is stamped "Received payment through the New York clearing-house. April 2, 1898. Endorsement guaranteed. Corn Exchange bank. Loftin Love, cashier."

Exhibit No. 7 is as follows: Transversely on the margin "The Sun." Then on the left "No. 23161." "$10,000." On the right hand at the top, "New York, May 14, 1898." Below "National Broadway bank." Below "Pay to the order of Thomas Manning ten thousand dollars." On the left at the bottom, "Thomas Hitchcock," written, the word "secretary" printed. Opposite that signature is "W. M. Laffan," written, with the word "manager" printed. On the back is endorsed "Pay to the Corn Exchange bank, New York, or order. Thomas Manning p'r T. St. J." Below stamped,

"Received payment through the New York clearing-house May 16, 1898. Endorsement guaranteed. Corn Exchange bank, New York, Loftin Love, cashier."

Q. When you drew this check for $5,000, Exhibit No. 6, did you enter that amount in any account which you kept?
A. No.
Q. Did you at any time enter that check or the amount thereof in any book of account which you kept?
A. Yes.
Q. Have you such book of account here?
A. I presume I have.
Q. Will you kindly produce it?
A. (The witness produces the book.)
66 Q. What book have you produced?
A. I have a journal here, No. 8.
Q. The journal of the respondent, The Sun?
A. The journal of The Sun.
Q. Will you please turn to the folio at which there is any entry relative to the check I asked you about?
A. Folio 24.
Q. Will you please point out the entry?
A. (The witness does as requested.)
Q. Is that in your handwriting?
A. That is.
Q. When did you write that entry?
A. Probably about the middle of May, 1898.
Q. And it is under what date?
A. Under the date of the 18th of April, 1898.
Q. Did you keep this book, this journal?

By the COURT:

Q. What is the entry there?
A. "Yacht *Kanapaha*, 5,000."
Q. Is that a debit or credit entry?
A. That is a debit entry.

By Mr. HUGHES:

Q. Under what heading is that entry?
A. "Editorial expense."
Q. And all the other entries under that heading, "Editorial expense," were entered by you at or about the same time?
A. Yes.
Q. And they are entries of various disbursements in connection with the acquisition of news?
A. Yes.
Q. For the Sun?
A. For the Sun, yes.
Q. Is there any other entry on that page which refers in any way to the yacht *Kanapaha*, or any expense connected with that yacht other than this $5,000 entry that you have mentioned?

A. I see none there that I would recognize as such.
Q. Are you able to state there is none such?
A. Yes.

Mr. HUGHES: I offer in evidence the entry to which I have just referred under the title of "Editorial expense."

Objected to.

67 Mr. HUGHES: I merely want to show what relation this item has to the other items on the page.

Q. On the same page on which you have pointed out this entry of "$5,000 yacht *Kanapaha*," you find at the top of the page a heading "Editorial salaries" do you not?
A. I do.
Q. And those are salaries paid by the Sun to its employees?
A. Yes.
Q. You notice the next heading on that page is "Subscriptions"?
A. I do.
Q. Are those debits of payments by the Sun or credits for payments for subscriptions?

Objected to as irrelevant.

The COURT: Ask if the other entries on the same page all relate to the business of the Sun.

Q. Do the other entries on this page 24 of the journal produced relate to the business of the Sun?
A. They do.
Q. I notice that at the top of this page are the words "April 30, 1898." You said the entry of the $5,000 relating to the yacht *Kanapaha* was made on the 18th. Does the figure "18" above the item, about 6 lines ahead of this one in evidence that I have read mean April 18?
A. It does.

By the COURT:

Q. How came the entry there regarding this $5,000 to be April 18 when the check was certified on the 2d?
A. I used my convenience in the entry, in making the entry. I keep it on memoranda some time.
Q. Does that date mean merely the date on which you put it in the book?
A. That means the date which it shows in the cash book.

By Mr. HUGHES:

Q. Have you the cash book here?
A. I have.

68 Q. Showing the source of this entry in the journal?
A. I have.
Q. Will you please produce it?
A. I will.

By Mr. HUGHES:

Q. Is this respondent's cash book that you have now in your lap?
A. It is.
Q. And you point to folio 183?
A. I do.
Q. To an item under the heading "Editorial expense"—what?
A. "Yacht *Kanapaha*, 5,000."
Q. Whose handwriting is that in?
A. My assistant's.
Q. Employed by the respondent?
A. Yes, sir.
Q. Do all the items on this page, folio 183, relate to the business of the Sun?
A. They do.
Q. This book is the regular cash book kept by the Sun?
A. It is. The one now in use.
Q. When was that entry made?
A. April 18, 1898.
Q. Have you any other entry or memorandum of any sort which was the source of that entry in the cash book?
A. None that I am aware of.
Q. How was that kept from April 2d when the check was certified to April 18 when the entry in the cash book was made—on a memorandum slip?
A. On a memorandum slip.
Q. A loose sheet of paper?
A. Yes.
Q. Wasn't entered in any book prior to the 18th?
A. No.
Q. Do you preserve those slips?
A. I do not.
Q. Was this entry posted from your journal to your ledger?
A. It was.
Q. Will you produce the account in the ledger showing that item?
A. (The witness produces the ledger.)
Q. This book that you now produce is the ledger kept by the Sun?
A. It is.
Q. And you turn to the account on page 139?
A. I do.
Q. What is the heading of that account?
A. "Editorial expense."
Q. Are all the editorial expenses entered in that ac- *character*
69 count?
A. All those that I call editorial expenses are.
Q. What do you call editorial expenses?
Objected to as irrelevant.
Q. What class of items appear in this account?
The COURT: I don't think that is necessary.

By the COURT:

Q. It relates to the Sun newspaper, does it?
A. Yes, sir. Of course that is a matter of detail.

By Mr. HUGHES:

Q. Will you refer to the entry which contains the item of $5,000 for the yacht *Kanapaha* to which you have referred in the journal?
A. $693,359.
Q. In other words, the item $693,359, which you find at folio 139 of the ledger under the head of "Editorial expense, April 30, 1898," is the total of items of aditorial expense shown on folio 24 of the journal to which you referred under the date of April 30, 1898, the separate dates of the various items entering into that total being opposite those items on the journal folio?
A. That is so.
Q. Who kept this account in the ledger?
A. This is my handwriting; I do.
Q. Will you point to the entry of the check dated May 14? Where is the item of $10,000 of May 14, 1898, of the check for that amount, Exhibit 7? You turn to folio 38 of the journal under date of May 31, 1898, under the heading "Editorial expense," do you not?
A. Yes.
Q. And under the heading "Editorial expense" there are various items under date of May 3, May 10, May 17, May 24 and May 31, aggregating $21,655.04. Is one of those items in that aggregate this check for $10,000?
A. It appears to be.
Q. Will you please read the item?
A. "May 17, charter *Kanapaha* to October 1, $10,000."
Q. That date, May 17, is the date of the entry in the cash book?
A. It is.
Q. From which this entry was posted?
A. It is.
70 Q. Are these entries, folio 38 of the journal, to which you have just referred, in your handwriting?
A. They are.
Q. And these entries following the entry of "Editorial," "Composition expenses," "Real-estate claims," "News agents," and so forth—are all in the business of the Sun?
A. They are.
Q. Please point in the cash book to the source of that item of $10,000 in the journal?
A. (The witness does as requested.)
Q. You turn to folio 203 of the journal?
A. Yes.
Q. Is this the Sun's cash book?
A. This is the Sun's cash book.
Q. And identify and read the entry relating to this $10,000?
A. "May 17. Editorial expense, yacht *Kanapaha*, $10,000."
Q. The entries on that page, folio 203, are in whose handwriting?

A. That of my assistant.

Q. And all the other entries on the page refer to the matters relating to the Sun's business?

A. They do.

Q. And the book was kept in the business of the Sun?

A. It is.

Q. Turn to the account in the ledger which shows that item of $10,000, posted from the journal entry, folio 38, to which you have referred?

A. There it is.

Q. You turn to folio 139 of the ledger you have already produced?

A. I do.

Q. And under date of May 31, you find what entry?

A. "Cash, $21,655.04."

Q. And that $21,655.04 is the total of the items of editorial expenses detailed on folio 38 of the journal under date of May 31, 1898. One of the items is the item of May 17, "Charter *Kanapaha* to October 1, $10,000"?

A. It is.

Q. I show you this folio 38 of the journal under date of May 31, 1898, and ask you whether on that page there is any other reference to the yacht *Kanapaha?*

A. Yes, I see an item, I think.

Q. What is it?

A. "Chubb & Son."

Q. "Ins."?

A. Yes, sir.

71 Q. Read the entry?

A. "May 31, 1898." Heading, "Editorial expense." "Chubb & Son, insurance, $1,478.64." "*Kanapaha*" on the line below.

Q. *Kanapaha* is part of that entry, is it not?

A. It is.

Q. And the $1,478.64 are part of the $21,655.04, the total of editorial expenses detailed in the journal under May 31, 1898, and posted in the ledger account to which you have already referred?

A. Yes, sir.

Mr. HUGHES: Will counsel please produce the policy of insurance written upon the yacht *Kanapaha?*

Mr. BARTLETT: I have no policy of insurance and have never seen it.

Q. Is there any entry in the cash book which is the source of that item "Chubb & Son, insurance, $1,478.64, *Kanapaha*"?

A. Undoubtedly there is.

Q. Please point it out.

A. *There* is the item.

Q. You turn to the folio 209 of the same cash book to which you have already referred?

A. Yes, sir.

Q. And you find the entry in the handwriting of your assistant?
A. I do.
Q. Under what title?
A. "May 31. Editorial expense."
Q. One of the items under that heading is what?
A. "Chubb & Son, ins. yacht, $1,478.64."
Q. Have you any other entry of that $1,478.64 in any book of account of the Sun?
A. Not by itself.
Q. Have you in conjunction with any other, except of course the ledger entry to which you have already referred, which includes that?
A. I have not to my best knowledge.
Q. Have you any voucher for that payment?
A. I believe there is a receipt among the documents.
Q. That is a debit to the Sun, is it not, in the book to which you have just referred—in the cash book?
A. It is.
72 Q. Please produce the receipt that the Sun received on making that payment?
A. (The witness does as requested.)
Q. Have you that receipt?
A. I have.
Q. And you now produce it. This is the receipt which the Sun received on making the payment of $1,478.64 insurance on the yacht *Kanapaha?*
A. It is.

Mr. HUGHES: I offer the receipt in evidence.
Objected to as incompetent, improper, irrelevant, and immaterial and on the specific ground that the insurance relates to the first charter-party, which had expired at the time of the loss of the vessel.
Objection overruled. Respondent excepts.
It is marked Libellant's Exhibit No. 8.

Q. Is there any other item in this journal of insurance moneys for the yacht *Kanapaha* paid by the Sun?
A. My memory does not carry all the items.
Q. Will you look and please see?
A. If you give me an idea of date that will help it.
Q. Look at the date of July 12, 1898.
A. I find an entry.
Q. You turn to folio 68 of the journal you have already identified.
A. I do.
Q. Respondent's journal. Under date of July 12 you find what entry?
A. "Spanish war, July 12, Chubb & Co., ins., $1,625.04."
Q. The words "Spanish war" constituted a heading under which there are several items, does it not?
A. It does.
Q. And the first of these items is that of July 12, "Chubb & Co., ins., $1,625.04." Have you the voucher for that payment?

A. I have (producing it).

Mr. HUGHES: We offer it in evidence.
It is marked Libellant's Exhibit No. 9.

Q. Have you another voucher for insurance on the yacht *Kanapaha?*

A. I appear to have (producing it).

73 Q. Dated July 30, 1898, for cost of insurance on yacht *Kanapaha* from August 2d, 1898, for one month?

A. Yes.

Mr. HUGHES: We offer it in evidence.
The COURT: Did that expire before this loss?
Mr. BARTLETT: Yes, sir.
The COURT: What was the date of the loss?
Mr. BARTLETT: September 5th.
The receipt is marked Libellant's Exhibit No. 10.

Q. Will you please show me the other item in the book of this payment of insurance?

The COURT: What was the last payment?
Mr. HUGHES: $746.64.

Q. Have you the entry in the journal referring to that?
A. I have.
Q. Under what date is it?
A. Under date of August 16.
Q. Under what heading?
A. "Spanish war."
Q. And there are a number of items there under the "Spanish War" heading?
A. There are.
Q. Read the entry which covers the insurance?
A. "August 16, insce. on *Kanapaha*, $746.64."
Q. To what account were those entries under the heading "Spanish war" in the journal posted in the ledger?
A. Spanish War account.
Q. Will you produce the Spanish War account?
A. This is on folio 499.
Q. Of the ledger. This is the Sun's ledger?
A. It is.
Q. In whose handwriting are the entries there?
A. My own.
Q. And you point out what item as including the premiums on insurance to which you have referred?
A. $15,580.73.
Q. That $15,580.73 is the total of all the items under the heading "Spanish war" in the journal on folio 80?
A. Of that date.
Q. And includes this item of $746.64?
A. It does.

74 Q. And the other item of insurance which you pointed out on folio 68 of the journal, "July 12, Chubb. & Co., ins. $1,625.04" was also posted in the Spanish War account of the ledger?

A. It was.

Q. And forms part of what item?

A. Item July 31, $15,680.65.

Q. That item was the total of the Spanish War items, folio 68 of the journal?

A. The journal.

Q. This Spanish War account on the left hand side has its first item May 31—what?

A. Items previously charged to editorial expenses.

Q. Please inform me what items have gone into that total of $25,498.91 debited to the Spanish War account on May 31, 1898, at the opening of said account opposite the heading "Items from charges to editorial expenses."

Objected to.

Q. What I want to know, is, whether the items of $5,000 and $10,000 paid for the yacht *Kanapaha*, which you have referred to as charged to "Editorial expense," included in this item brought to the debit of the Spanish War account?

A. They are.

Q. That account was opened on what date? What is the first entry in the account?

A. 1898, May 31.

Q. It is headed in what way?

A. "Spanish war"—"War declared April 21 by Congress,"—"April 25, 1898."

By the COURT:

Q. Between what dates does that run?

A. May 31 and December 31, 1898.

By Mr. HUGHES:

Q. Can you inform me whether there are any items relating to the yacht *Kanapaha* other than the $5,000 and $10,000 respectively, to which you have already referred, and other than the insurance premiums to which you have referred, included in those
75 debit items in the Spanish War account in the ledger?

A. The Spanish War account covers all the items of the war, and I suppose in that must be others included.

Q. Have you in the journal details of the items that went to the Spanish War account?

A. Not in detail, they are bulked there.

Q. There are some details?

A. There are some details.

Q. Please point out the items which relate to the expenses and wages of the persons employed on the *Kanapaha* after April 1, 1898.

A. I can't do that.

Q. I call your attention to the account in the journal, April 30, 1898, and to the heading "Editorial expense account." I would like to ask whether in the journal there are not some items referring to the expenses incurred in connection with the yacht *Kanapaha* in April, 1898.

A. Probably, yes.

Q. You know that there are, do you not?

A. Yes; I know there are.

Q. Can you point them out?

A. I see none other than what I pointed out in the previous instance.

Q. Can't you in a moment, taking the book and looking at it, identify some of these items?

A. The only item there relating to the *Kanapaha* is that $5,000.

Q. Can't you by looking at other folios of the book find out these items?

A. You said on April 30.

Q. I did mention that because I thought that would assist you. You know better about these than I do. If you will point out where these items are it will save time.

A. I see an item here which I infer is a *Kanapaha* item under date of May 31. "White & Co., *Kanapaha*."

Q. How much?

A. "$509.82."

Q. Who are White & Co.?

A. I don't know.

By the COURT:

Q. Do you know what the item is for?

A. I think I know, but I am not sure of it.

By Mr. HUGHES:

Q. Is there a source of that item in the cash book?

A. There may be in more detail.

76 By the COURT:

Q. Do you have a voucher corresponding to that entry?

A. I may have. There it is.

By Mr. HUGHES:

Q. You refer to fol. 193 of the cash book?

A. I do.

Q. Under what date?

A. May 3, 1898.

Q. Read the entry.

A. "Editorial expense, White & Co., yacht account, $509.82."

Q. Was there a provisional account kept of expenses in connection with the yacht *Kanapaha?*

A. There was.

Q. Have you that account here?

A. The account you have already seen called "Spanish war."

Q. You call the account in the ledger, "Spanish War account," a provisional account?

A. I do.

Q. And that is the only provisional account that there was of these expenses?

A. Yes, sir.

Q. Have you produced all the vouchers that you have?

By the COURT:

Q. What do you mean by the word "provisional" there?

A. I mean an account which shall include all items until they are charged to their final accounts.

By Mr. HUGHES:

Q. I call your attention to the "Spanish War account." The entries on the debit side are monthly; entries at the end of the month, are they not?

A. They are.

Q. And the details of these entries are found in the journal and cash book?

A. Yes.

Q. Anything else?

A. What I meant by my hesitation is that the journal may not have given full detail.

Q. Do you know any other source of information other than the journal and cash book of the entries that went to the debit of the "Spanish War account"?

77 A. Bills of some of the reporters may have fuller details.

Q. Have you such bills here?

A. We have.

Q. Have you some here?

A. We have.

Q. Will you produce them.

A. (The witness produces the bills.)

Q. What reporter handed in these bills that you have before you?

A. These are the accounts of Mr. W. J. Chamberlin.

Q. And submitted to the Sun?

A. And submitted to the Sun.

Q. Reaching your department?

A. They did.

Q. Came to your charge?

A. Yes, sir.

Q. Are there items in those bills relating to the yacht *Kanapaha*?

A. Undoubtedly.

Q. Are there items which entered into these bills which were charged to the Spanish War account in the ledger?

A. Undoubtedly.

Q. Please pick out from those, those that contain items relating to the *Kanapaha*.

A. I regret to say I cannot do that.

Q. Do you mean that there is nothing to identify the items on these bills?

A. These bills are covered by drafts; the drafts were entered in bulk.

Q. Whose drafts?

A. W. J. Chamberlin's.

Q. On whom?

A. On the Sun.

Q. Will you allow me to look at these bills?

Mr. BARTLETT: I object to that. They have no right to ransack our accounts. We will admit Mr. Chamberlin was on the yacht and employed by us and paid by us.

Q. I want to know whether there are in these papers——

Mr. BARTLETT: I object to counsel examining our papers.

78 Q. I would like to find out whether there are here any vouchers of payments to Captain Packard and persons who were employed in the navigation of the yacht *Kanapaha?*

A. I don't know that.

Q. Will you please glance through here with me and inform me.

Mr. BARTLETT: We are going to have Chamberlin here. Why can't he answer that? Don't go into the examination of those papers unless the court orders it.

The COURT: Hand the witness those papers. Let him run over them and see if he can identify any.

Q. My eye comes on a batch of papers headed "Steamship *Kanapaha*, June 22, 1898." Look at that and tell me if there is anything there relating to the expenses connected with that boat?

A. It would seem to be from the statement of the paper itself. I will say in explanation for the court that Mr. Chamberlin drew a draft which covered all these papers and I entered the draft in bulk. That is all I know about it.

Q. Have you any voucher showing advances to Capt. Packard amongst any of these papers?

A. Not to my knowledge.

Q. Will you glance through quickly and see if you have or not? Do you find anything there?

A. I do not.

Q. I show you this among those papers that you have produced, dated June 22, 1898, "To steamship *Kanapaha*, bought of C. E. Johnson & Co." Is that voucher for supplies to the yacht *Kanapaha*, for amount of which drafts were drawn on the Sun by W. J. Chamberlin?

Objected to.

The COURT: He has answered that, that he drew the draft in bulk.

The WITNESS: Chamberlin drew the draft.

Q. That is true of these particular vouchers?

79 A. It appears to be. I didn't contract the bill. I don't know.

Q. But you honored these vouchers?

A. I did not.

Q. The Sun did?

A. The Sun honored the draft of W. J. Chamberlin.

Q. Including these?

A. I don't know.

Q. Is there any draft or order attached here referring to it?

A. There is not.

Q. Did these come to you with a draft drawn by Chamberlin, these vouchers?

A. They did not. They were rendered to me after Mr. Chamberlin's return.

Q. By Mr. Chamberlin?

A. By Mr. Chamberlin.

Q. As a report of what had gone into the drafts he had drawn?

A. His account of the expenses.

Q. In the amounts furnished to him by drafts drawn on the Sun?

A. The drafts drawn on the Sun were doubtless included in these amounts. He had other ways of getting money.

Q. Have you got an account submitted by Mr. Chamberlin to you to which you refer?

A. I refer to this account.

Q. What do you refer to as the account submitted at the time these vouchers were handed to you?

A. I don't understand your question.

Q. To what account do you refer as the one submitted to you at the time these headed "Steamship *Kanapaha*" were handed to you?

A. These that I hold in my hand.

Q. Can you point out the one that accompanied the vouchers?

Mr. BARTLETT: In order to stop this waste of time we will admit that we paid all the running expenses of the yacht from the making of the second charter-party to the time of the loss.

Mr. HUGHES: Your statement as to the payment of all expenses, then, covers from May 14, 1898, to Septembe- 5, 1898, and that includes the wages of Captain Atkinson, who was captain of the boat at the time of the loss.

Mr. BARTLETT: I presume so. I think he has testified to that already.

80 Q. Have you any vouchers here from the period from April 1 to May 14?

The COURT: I won't go into that any more.

Q. Will you please turn again to the Spanish War account. In that ledger on the credit side of that account under date of May 31, 1898, you find what item—the third on the credit side of the page?

A. "May 31. Press, *Kanapaha*, $1,444.25."

Q. Will you turn to the journal to show the source of that?

A. I will turn to the cash book to save time.

Q. Can you state without turning to the books if those were receipts by the Sun from representatives of other newspapers for privileges on board the yacht *Kanapaha* which the Sun furnished?

A. No.

Q. Point to the source of the item?

A. I refer to the Journal, folio 35, date May 31, under the head, "May 31, 1898, subdate, Spanish war, May 28. Press account, *Kanapaha*, $1,444.25."

Q. That says "Press account," does it, or "Press account *Kanapaha*"?

A. "Press account *Kanapaha*."

Q. What do the words "Press" mean?

A. I infer they refer to the New York Press newspaper.

Q. Is that a credit item?

A. That is a credit item.

Q. A credit to whom?

A. To the "Spanish War account."

Q. For moneys received by the Sun?

A. Yes, sir.

Q. From the New York Press?

A. Undoubtedly.

Q. In connection with the yacht *Kanapaha*?

A. Apparently so from the entry.

Q. The paper, the New York Press, I suppose?

A. The New York Press; yes, sir.

Q. Have you any entries there, or in this book, of receipts from Harper's Weekly by the Sun in connection with the Kanapaha?

By the COURT:

Q. Doesn't the journal show all these?

A. Yes, but the journal takes longer to run through. I
81 guess I will have to do it, though. Under head of "June 30, 1898, Spanish war. Subdate, June 11."

By Mr. HUGHES:

Q. Read all the items relating to the *Kanapaha*.

A. "Harper's, *Kanapaha*, 500."

Q. It is dollars, is it not?

A. Book-keepers don't put the word dollars in. Of course the word "dollars" is understood.

Q. It is carried out as dollars in the total?

Mr. BARTLETT: That is "500."

A. Dollars is meant.

Q. There are other items under the heading "Spanish war" under this date June 30, 1898, are there not?

A. Appear to be.

Q. Relating to other papers?

A. Undoubtedly.

Q. All credit items of moneys received by the Sun?

A. Yes.

Q. Read them.

A. "June 2, Detroit news account, *Kanapaha*, 250." "June 6, Scrib.'s, *Kanapaha*, 1,000." "Press, *Kanapaha*, 500," you have.

Q. Isn't the Globe-Democrat 250?

A. The Globe-Democrat is 250, but it does not say "account *Kanapaha*." We had other interests.

Q. And that is true of "Journal, 1,000"?

A. It is.

Q. But "Press, *Kanapaha*, 500"?

A. Yes. June.

Q. What do you have below that? Is that in relation to the *Kanapaha?*

A. It is not.

Q. "Harper's, *Kanapaha*, 500"?

A. Yes. June 11 we have "Harper's, 500"—that has been given. That is all I recognize as belonging to the *Kanapaha*.

Q. What is that under "*Kanapaha*" opposite "Journal"?

A. That is "Harper's."

Q. What is *that?*

A. "&c."

Q. Opposite "Journal"?

A. No, it is "*Kanapaha*, &c., 500."

By the COURT:

Q. That is all under the first charter. Was there anything under the second charter?

82 Mr. HUGHES: That was under date of June 30; the first charter expired June 1st.

By Mr. HUGHES:

Q. Is there a Spanish War account under date of May 31?

A. There is not. It was opened that day.

Q. This is all under "Editorial expense"?

A. It is.

Q. Are there receipts from other newspapers in connection with the *Kanapaha* under it, under "Editorial expense" prior to June 1st, 1898?

A. There were not.

Q. There were moneys received by the Sun during that period, were there not, in connection with the *Kanapaha?*

A. No.

Q. Then there were no other reporters of other papers that you know of on the yacht *Kanapaha* until after June 1st?

Mr. BARTLETT: How does he know?

A. I made no contracts.

Q. Have you got the voucher which you received, or which came to your possession, for the payment of $5,000 on April 2d for the yacht *Kanapaha?*

A. Payment to whom?

Q. To Manning.

A. I don't know. I think not.

Q. Will you look and see, please?

A. If we have those vouchers they are in our archives, but I haven't got them here.

Q. And you haven't the one for the $10,000?

A. We have the check here, and that is voucher sufficient.

Q. You haven't any other voucher here?

A. No.

Q. Will you kindly see if you have a receipt given by Mr. Manning for $5,000 or $10,000 and produce them here after Monday morning?

A. I will.

Q. Was there not some account kept of some sort, of these items prior to their entry in the cash book, some voucher account or account of these memorandum slips that you have mentioned?

A. Do you refer to payments with us? Those memorandum slips, that is all.

Q. Didn't you have some book account of these memorandum slips?

A. No, sir.

83 Q. Or of the vouchers?

A. No, sir.

Q. Do you have any voucher books with stubs, regular vouchers?

A. No.

Q. From what source did you get the items that you put on the memorandum slips?

A. Memoranda doubtless taken at the time the check was drawn.

Q. From the check book?

A. At the time the check was drawn, from memory.

Q. Have you the check books from which these checks were taken which were given to Manning?

A. The stubs are here. We have not the checks themselves. Which stubs?

Q. $5,000, April 1st, 1898.

A. (The witness produces the stub.)

Q. Read it.

A. "No. 37951." Date, "April 2d, 1898." "Order Thomas Manning. Account of —— ——; amount, $5,000."

Q. Refer to the second one, please.

A. That stub is not here; it is in use in the office at this moment.

Q. Of the second check?

A. Yes.

Q. Will you have that here Monday?

A. I will have it here.

Q. Have you the stubs for those insurance premiums of May 31, 1898?

A. Yes, sir; what is the number of the check?

Mr. BARTLETT: Isn't the check enough without the stubs?

Q. 38969?

A. Check No. 38969. Date, May 31, 1898. Order of Chubb & Son, account of —— ——, $1,478.64.

Q. No. 39812?

A. Check No. 39812. Date, July 12, 1898. Order Chubb & Son. account of —— ——, $1,625.04.

Q. 40423?

A. 40423. Date, August 16, 1898. Order Chubb & Son, account —— ——, $746.64.

Q. These three checks, the stubs of which you have just referred to, are all signed by you, are they not?

A. They are.

Q. To whom did you deliver those checks?

A. My memory is that they were sent by mail.

84 Q. To the drawee?

A. To Chubb & Son.

Q. By you?

A. By me or by my assistant.

Q. And before you sent these checks you had received these bills which have been introduced in evidence, Exhibits 8, 9, and 10, had you not?

A. We had.

Q. And you sent these back with the check stamped, "Please receipt and return to L. O. Macdaniel, the Sun, New York"?

A. We did.

Q. Take the journal and turn to July 31, 1898, and tell me if you find there entries of receipts from other newspapers in connection with the yacht *Kanapaha*.

A. I find entries of receipts Spanish war, but the *Kanapaha* is not specified.

Q. Is there any other account which would show?

A. The cash book might throw some light on it (referring to the cash book).

Q. The entry in the cash book is "Spanish war, Harper's Weekly, June 1st to July 1st, $500."

A. It is.

Q. Does that enable you to state whether that is in connection with the *Kanapaha?*

A. My recollection is that it was not.

Q. You find under July 30, 1898, what entry?

A. "Spanish war, Press, *Kanapaha* and *Premier*, $1,000."

Q. What is the *Premier?*

A. *Premier* is the name of another vessel.

By the COURT:

Q. In the same employment?

A. The same employment.

By Mr. HUGHES:

Q. You find under date of August 5th, 1898, what entry in the cash book?

A. In the cash book, "Spanish war, Harper & Brothers, *Kanapaha*, 500."

Q. *Kanapaha*, July?

A. *Kanapaha*, July, 500.

Q. These items that you have just read, both the one of July 30 and of August 5, were entries of moneys received by the Sun from the newspapers you refer to?

A. They are.

85 Q. These moneys which were received and so entered and credited to the Spanish War account were deposited in bank to the credit of the Sun?

A. They were.

Q. When you got the check from the Press, the New York Press, where did you first enter that check?

A. The cash book.

Q. The entry you have identified?

A. Yes, sir.

Q. And from that you posted it into the journal?

A. Yes.

Q. From that to the Spanish War account?

A. In the ledger.

Q. And those are the only entries and books relating to the receipts?

A. They are.

Q. Is there any other account or any items in any book or memorandum that you have showing receipts by the Sun from any newspaper in connection with the *Kanapaha*?

A. Not to the best of my knowledge.

By the COURT:

Q. How did these checks come to your hands?

A. Some of them by mail.

Q. Addressed to you?

A. No, they would be addressed to the Sun.

Q. How did they actually come to your own hands, through what channel?

A. Various channels. Some of them, for example, turned in to me by Mr. Lord; others came by mail and came to my department.

Q. If they came by mail they would be addressed to the Sun?

A. In general, yes.

Q. Who opened letters addressed to the Sun?

A. A young man whose particular business it is. He departmentizes them.

Q. He separates them?

A. He separates them.

By Mr. HUGHES:

Q. When Mr. Lord put moneys in your hands did he accompany them by any statement showing the source from which they were derived or any written memorandum?

A. He did not.

Q. Simply gave them to you?

A. He did.

Q. And these items that you have pointed out of receipts
86 from newspapers in connection with the *Kanapaha* are included in these details and entered monthly to the credit of the "Spanish War account," folio 499 of the ledger?
A. That is so.

Mr. HUGHES: I offer in evidence the "Spanish War account," folio 499.

Mr. BARTLETT: They have all been read in evidence. I object to the admission of other entries in evidence as improper, irrelevant, and immaterial.

The COURT: I admit it.

Mr. HUGHES: The heading of the whole account is, "Spanish war."

"DEBIT SIDE."

1898, May	31.	Editorial expense. Items previously charged to editorial expense, fol. 29.....	$25,498.91
" "	"	Cash, fol. 41.....	25,121.85
" June	30.	Cash, fol. 51.....	14,936.56
" July	31.	Cash, fol. 68.....	15,680.65
" August	31.	Cash, fol. 80.....	15,580.73
" September	30.	——."	

Mr. BARTLETT: I object to any items after the loss of the vessel.

The COURT: Yes, I exclude those—anything that does not pertain to this vessel.

Mr. BARTLETT: Not one of these items just read refer to the *Kanapaha*.

The COURT: I suppose these include certain items which have been before stated.

The WITNESS: These do.

The COURT: I allow the question as to the last item there by which this account was closed on the books.

By the COURT:

Q. On looking at your book can you tell us what was the aggregate amount of the debit side of this provisional account as
87 you have called the account headed "Spanish war"?
A. $147,374.
Q. Is that account balanced or unbalanced?
A. Balanced.
Q. When was it balanced?
A. December 31st, 1898.
Q. Which was the shorter side?
A. The credit side was short.
Q. How was that account balanced?
A. By charging another account to deficit.
Q. And the deficit was how much?

A. I must say in explanation that each month there was a proportion charged to its final account and that December 31st the balance was $27,131.11.

By Mr. HUGHES:

Q. Where do you find any entry of any proportion of these debit items being charged to any other account?

A. For example, on June 30 I find "Editorial expense" charged $4,909.32.

By the COURT:

Q. Explain what that means?

A. Those are positive charges.

Q. That means what?

A. That means from the Spanish War account this sum was taken and charged against the editorial expense account.

Q. For what purpose—why?

A. For the purpose of taking that amount out of the Spanish war and definitely charging it to the editorial expense account.

Q. By that do you mean that the debit side does not show the whole by so much?

A. No.

Q. How is it taken out then? That looks as if there was a deficit. You have given credit to editorial expenses?

A. I debited editorial expenses.

Q. In another account. But here you credit Spanish war with so much which elsewhere must be charged to editorial expenses?

A. Exactly.

By Mr. HUGHES:

88 Q. On May 31, 1898, you charged to the Spanish War account for items previously charged to "Editorial expense" $25,498.91, don't you?

A. Yes, sir.

Q. On the same date you credited the same account with the same amount, didn't you?

A. I did.

Q. So that the entries balanced each other?

A. That was for the object of making the Spanish War account show the whole expenses of the war.

Q. On the same date, May 31, 1898, as the second item on the debit side you charged to the Spanish War account $25,121.85. That was the total of the entries you thought applicable to the Spanish war, of the expenses of the Sun?

A. For the month of May.

Q. In the same month you charged to "Editorial expense" and credited to the Spanish War account $11,348.50?

A. I did.

Q. That meant the Sun had received from some source the difference between $11,348.51, charged to the editorial expense account and this amount, $25,121.85, charged to the Spanish War account?

A. No, it did not.
Q. What did it mean?
A. It meant that that amount which has been debited to the Spanish War account in May, $25,121.85, I had received vouchers of which there could be no question for $11,348.50, which should go to the "Editorial expense."

By the COURT:

Q. Which properly belonged to the publication of the Sun?
A. Yes.
Q. Not including claims against other papers?
A. Nothing to do with other papers.
Q. What the Sun paper should bear?
A. Yes, sir.

By Mr. HUGHES:

Q. Then I understand that the end of May those expenses which had been included in this debit charge to the Spanish War account, for which you had definite vouchers, were definitely and finally charged to the editorial expense account of the Sun and the
89 amount of such definite claims was credited to the Spanish War account.

Objected to as irrelevant.
The COURT: I understand that is precisely what the witness said before.

Q. And that was done each month through the time this account was kept?
A. It was.
Q. The result was that every item charged to the Spanish War account was ultimately charged to the editorial expense account of the Sun?
A. In general, yes.
Q. Is it not a fact that there are included in the items on the credit side of this account certain receipts from other newspapers in connection with the *Kanapaha?*
A. Certain receipts are included.

By the COURT:

Q. The items of which you have before stated?
A. I have.

By Mr. HUGHES:

Q. And the difference between the amounts of such receipts and the amounts charged to the Spanish War account were then finally and definitely charged to the editorial expense account?

Objected to as having been answered three times.

A. It was.
Q. And the last item under date of December 31, 1898, of the Spanish War account was the closing, by taking out of the Spanish

War account and charging finally to the editorial expense account of the Sun the sum of $20,731.11?

A. That is the final entry.

Q. And that closed the provisional account?

A. Yes.

Q. Have you produced here any letters which have been received by the Sun from any other newspaper association or company publishing a newspaper with reference to the furnishing of privileges upon the yacht *Kanapaha?*

A. I find no such letters in existence.

90 Q. Have you produced here any letter books of the New York Sun showing letters written by it or on its behalf to any person or companies or newspapers relative to privileges on the yacht *Kanapaha?*

A. I am not authorized to make a contract, so I produce no such books.

Q. You are here as a witness. I understand Mr. Dana has been subpœnaed, but we don't want to trouble him. Are there not such books here, Mr. Bartlett?

A. I can answer. Demand was made for those books, but they were not in existence. The Sun does not keep such books.

Q. The letter books of 1898 are not in existence?

A. There are no letter books of 1898.

Q. Are there no books in which copies of letters written by the Sun in May, 1898, were kept?

A. Some clerks keep their own copy books, but nothing you can call the general books of the Sun.

Q. Have you looked to see if there are any such letters?

A. I have.

Q. Have you found any such?

A. I did not.

Q. Have you any memorandum or book or entry of any sort other than these that you have identified referring to the *Kanapaha?*

A. I have not.

Q. Have you looked for any such?

A. I did.

Q. What are these other books that you have produced here?

Mr. BARTLETT: Don't answer. They speak for themselves.

Q. In these other books are there any entries relating to the *Kanapaha?*

A. I don't know without examination.

Q. Have you examined them?

A. Not recently.

Q. So that you can state whether or not there are any such entries?

A. There is an account, an amount in which the *Kanapaha* was probably interested, but it does not come separately as a *Kanapaha* account.

91 Q. Will you show me that, please?

A. It will take a few minutes to find it.

Mr. BARTLETT: Refer to that only by name.

A. I find I am mistaken. There is nothing there about the *Kanapaha.*

Q. Have you produced any policy of insurance written upon the yacht *Kanapaha?*

A. I have not.

Q. Have you searched for any such?

A. I have.

Q. But you have not found it?

A. I have not.

Q. Did you make any inquiry in the office of the Sun relative to it?

A. I did.

Q. Have you any other vouchers here relative to the *Kanapaha?*

A. I have accounts of some of the reporters.

Q. Relating to that boat?

A. Yes, sir.

Q. Will you let me see them, please?

Mr. BARTLETT: We admit that we had certain reporters on the boat and we paid them and paid their expenses. I object to anything further.

Mr. HUGHES: Will you admit that you paid all the expenses of the yacht *Kanapaha,* including the salaries of the officers and crew, from the first of April, 1898, down to the time of the loss?

Mr. BARTLETT: I have made one admission under the second charter-party.

The COURT: The reporters did not belong to the yacht herself. Do you admit that at all times you had one or more paper employees on the yacht?

Mr. BARTLETT: She may have been lying at port and they have been off some day, but I admit we had reporters on.

Mr. HUGHES: From April 1st, 1898, onto the time of the loss?

Mr. BARTLETT: You can ask Chamberlin. He will testify to that.

92 By the COURT:

Q. Were you on the yacht at all?

A. I was not.

The COURT: He can't testify about it then.

Mr. HUGHES: I understand the admission is from May 14, 1898.

Mr. BARTLETT: We had reporters on board and paid their salaries. I don't know that we had anybody but Chamberlin on at the time of the loss. We admit we had one on.

By Mr. HUGHES:

Q. Do these vouchers or accounts of reporters that you have here relate to the period between April 1st, 1898, and June 1st, 1898, any of them?

A. Yes, sir.

Q. Will you please produce them?

The COURT: It seems to me we have enough of that. As I understand the admission was that from May 14 on, the Sun had a reporter on the yacht during her service and that the Sun paid the expenses of this Mr. Chamberlin or any other reporter who was there. Was there any other paper that had reporters on the yacht? Or were all the reporters in the Sun's employment?

Mr. BARTLETT: I think at one time there were men from other papers on board. But I think Mr. Chamberlin can tell, the witness cannot.

Mr. HUGHES: I am in position to offer proof showing that the same condition of things existed between April 1st, 1898, and May 14, 1898.

The COURT: I rule that is immaterial.

Mr. HUGHES: What I mean by the same condition of things is that the Sun during this period continuously had reporters on the yacht *Kanapaha* and paid all the expenses of such reporters,
93 and also during this period paid all the running expenses of the boat, the salaries and wages of the officers and crew and the expense of putting her in commission and supplying her with coal and provision-.

The COURT: I think it is unnecessary to go into that any further than it has been done already.

Mr. HUGHES: We except.

Cross-examined by counsel for respondent.

By Mr. BARTLETT:

Q. At the time of the payment of the first check, $5,000, was Mr. Laffan in Europe?

A. He was in Europe.

Q. Did Mr. Lord make any statement to you about any trustee refusing to sanction the making of the charter-party?

Objected to as incompetent, irrelevant, and as not binding on the libellant in this action.

The COURT: I exclude that question. I cannot take the witness's testimony as to Mr. Lord's statements. That is not cross-examination.

Q. Did you give the $5,000 check to Mr. Chester S. Lord?

A. I did.

Q. What did he say to you?

Objected to as incompetent and irrelevant: that any statement made by Chester S. Lord to the witness is not binding upon the libellant, that the witness is not connected with the libellant in any way and the testimony offered is hearsay.

The COURT: I allow it so far as to admit any statements made by Mr. Lord to the witness in connection with the direction
94 to draw the check. I don't allow conversation about it after it was done.

Mr. HUGHES: We except.

The COURT: My ruling is that whatever was said by Mr. Lord to

you in connection with the direction to draw the check, or send it or deliver it, you should state, but that mere conversation over it afterwards and independent of those acts should not be given.

Mr. HUGHES: We except.

A. In the absence of the manager the proper person authorized, Mr. Lord, did make some explanations of why he wanted the check.

Q. The manager was Mr. Laffan?

A. Mr. Laffan.

Q. What did he say?

A. He said that with the check he hoped that Manning would accept his signature, as the secretary had refused to sign the charter-party.

Q. Who was the secretary?

A. Thomas Hitchcock.

Mr. HUGHES: I would like you to produce on Monday any voucher which you said you would look for, received by the Sun or in the office of the Sun, on the payment of the $5,000 and $10,000 respectively on April 2 and May 14, 1898.

Mr. HUGHES: I call for the files of the Sun of May 2 and 3, 1898.

They are produced by counsel for respondent.

Mr. HUGHES: I offer in evidence from the Morning Sun, published by the respondent on Monday, May 2, 1898, on p. 5 of the said paper the following paragraph purporting to be a news item of Key West of April 28:

"For instance, on the first night out and before private signals had been supplied to the newspaper dispatch-boats, one of the torpedo-boats in the course of its duty saw the Sun's *Kanapaha* looming up through the night. The *Kanapaha* has an outline which suggests — 2."

95 Objected to as irrelevant and immaterial, incompetent and improper.

The COURT: I will admit the passages now and rule on them hereafter.

Mr. HUGHES: I offer in evidence from the Sun newspaper published by the respondent on May 3, 1898, on p. 3, the following:

"The Sun's yacht, the *Kanapaha*, met the *Nashville* 15 miles northeast of Havana; both were looking for the flagship."

Objected to as incompetent, improper, irrelevant and immaterial; that it is admitted the *Kanapaha* was used.

Mr. HUGHES: I offer in evidence from the Sun newspaper published by respondent May 19, 1898, on p. 2, the following:

"On reaching Cape Haytien the Sun's yacht *Kanapaha* found a pile of coal of comfortable size on shore," and another statement: "But when Captain Packard of the *Kanapaha* got ashore he found that the coal belonged to a man who knew how to corner the market."

The COURT: Strike out the last question.

Mr. BARTLETT: We except.

Mr. HUGHES: I offer in evidence from the Sun newspaper of May 29, 1898, on the first page, the following:

"The Sun's yacht *Kanapaha* returned today from her cruise along the north shore of Cuba."

Mr. BARTLETT: I object on the same grounds as previously stated.

Mr. HUGHES: I also offer in evidence from the Sun newspaper of June 14, 1898, published by the respondent, p. 2, the following:

"Before it was sighted a party from the *Kanapaha* including the Sun reporter, landed on the Key. While the Sun's small boat was ashore the *Suwanee's* landing party was sighted."

96 There is a great deal about the *Kanapaha* all through here, and the connection shows that that reference is evidently to a small boat taken from the *Kanapaha*.

Mr. BARTLETT: I object to the statement of counsel.

Mr. HUGHES: Then I offer the entire article in evidence. Now I offer in evidence from the Sun newspaper, published December 11, 1898, by the respondents, the following, p. 1:

"Yacht *Kanapaha* wrecked. All hands saved. One of the Sun's despatch-boats during the war."

Then special cable despatch to the Sun:

"Santiago de Cuba, Sept. 10th.—General Lawton received a despatch today from the north coast of the island saying that the steam yacht *Kanapaha*, Capt. Atkinson, was wrecked on the reefs above the Bay of Nipe north coast of Santiago province, September 8. The boat was a total loss. All hands were saved."

That is the end of the despatch. Then follows:

"The *Kanapaha* was chartered by the Sun before the outbreak of the war as a despatch-boat. She was formerly J. Pierrepont Morgan's first *Corsair*. She was built in 1880, at Philadelphia. Her length was 173½ feet, beam 23 feet, depth 11½, gross tonnage 248. Her owner was W. L. Moore."

"The *Kanapaha* sailed from Santiago with Gen. Miles and the party left for Porto Rico. When wrecked she was on her way from Ponce to Havana. She sailed from Ponce on September 1st, stopping on the way at Guanica and Mayaguez. Capt. Atkinson is a thoroughly able skipper. He has had command of a number of private yachts of prominent Americans. The *Kanapaha* was the fastest and most seaworthy newspaper despatch-boat in the West Indies during the war. The Sun's representative aboard her was Mr. W. J. Chamberlin."

97 Objected to as incompetent, irrelevant and immaterial.

Mr. HUGHES: I offer in evidence the paper itself.

Objected to as incompetent, improper, irrelevant and immaterial. And on the specific ground that respondent cannot be bound by any statement made in the paper as to a charter.

The COURT: I reserve ruling on these objections.

LEONARD O. MACDANIEL, recalled for libellant, testifies:

By Mr. HUGHES:

Q. I show you the paper marked Exhibit 3 for identification, and ask you first whether you are familiar with the handwriting of Chester S. Lord, managing editor of the Sun?

A. I am.

Q. And have you seen him write?
A. I have.
Q. I will ask you whether the superscription to that paper, marked 3 for identification, the words "Chester S. Lord, for the Sun Printing and Publishing Association" are in the handwriting of Mr. Chester S. Lord, managing editor of the Sun?
A. The words "Chester S. Lord" I should say are, but the balance I would be doubtful of.
Q. Will you say the balance is not in Mr. Lord's handwriting?
A. No.
Q. I now show you the paper marked Libellant's Exhibit 4 for identification, and ask you whether the words subscribed thereto, 'Chester S. Lord, for the Sun Printing and Publishing Association," are in the handwriting of Chester S. Lord?
A. The words "Chester S. Lord" are, but the balance I am uncertain of.
Q. You won't say the balance is not in his handwriting?
A. I will not.
98 Q. Now I show you Exhibit 5 for identification. The words "Chester S. Lord, for the Sun Printing and Publishing Association" are in whose handwriting?
A. The words "Chester S. Lord" in Mr. Lord's handwriting, the balance I am not sure about.
Q. You won't say the balance is not in his handwriting?
A. I will not.

JAMES P. J. MORRIS, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. Where do you reside?
A. 132 East 128th street, New York.
Q. What is your occupation?
A. Law clerk.
Q. Where are you employed?
A. At 45 Broadway.
Q. In whose office?
A. With Hyland & Zabriskie.
Q. Where were you employed on the 2d day of April, 1898?
A. At their office, 45 Broadway.
Q. Are you a notary public?
A. I am.
Q. I show you a paper and ask you to look at the signature "James P. J. Morris, notary public, N. Y. Co.," and ask if that is your handwriting?
A. It is.
Q. Is that your seal that you affixed?
A. It is.
Q. Did you affix it at the time of that superscription?
A. I did.
Q. That is appended to a certificate of acknowledgement in which

there are certain interlineations, or rather words written in in ink. Are those words written in in ink in your handwriting, in the certificate of writing?

A. They are.

By the COURT:

Q. When were those interlineations made by you?

A. Before I took the—at the time I took the acknowledgement of Mr. Lord.

By Mr. HUGHES:

Q. You took the acknowledgement of Mr. Chester S. Lord at that time?

A. Yes.

99 Q. To his execution of the paper now in your hand?

A. Yes, sir.

Q. Was this signature, "Chester S. Lord, for the Sun Printing and Publishing Company" at that time on the paper?

A. At the time I took it?

Q. At the time you took the acknowledgement of Mr. Lord?

A. It was.

Q. What did you ask Mr. Lord with reference to the execution of that paper at that time?

Mr. BARTLETT: I object to any examination without having the opportunity to look at the paper and until the paper is offered in evidence. That the witness cannot be examined until the paper is offered in evidence, because if the paper is executed his evidence will be absolutely immaterial.

The COURT: I allow the question.

A. I asked him if he knew the contents of this instrument and had signed this instrument as it was signed, "Chester S. Lord, for the Sun Printing and Publishing Company," and if he executed the above instrument as on behalf of his firm, under the authority of said company as its act and deed, and he said that he did.

Q. Did you also ask him whether he was authorized to execute it?

Objected to as leading and improper.

A. I did.

The COURT: I disallow any further question about it.

Mr. HUGHES: We except.

The paper is marked for identification Libellant's Exhibit 12.

Cross-examined by counsel for respondent.

By Mr. BARTLETT:

Q. In whose office are you?

A. Hyland & Zabriskie's.

100 Q. Where is that?

A. 45 Broadway.

Q. Hyland & Zabriskie?
A. Yes, sir.
Q. Is that connected with the office of the attorneys?
A. No, sir, a different firm entirely.
Q. How long have you been a law clerk?
A. About fifteen years.
Q. How did you come to testify here?
A. I was subpœnaed.
Q. With whom did you converse before you gave your testimony?
A. With whom did I converse? With Mr. Manning, Mr. Murray and Mr. Hughes.
Q. I notice that when you were testifying as to what was said to you by Mr. Lord at the time, you read the words of your acknowledgment. Is that so?
A. That is right, I did; yes.
Q. In order to refresh your memory?
A. Yes, yes.
Q. So as to get it all in?
A. So as to get it all in.
Q. So as to cover your certificate?
A. Just what I administered when I took the acknowledgment.

Redirect by counsel for libellant.

By Mr. HUGHES:

Q. I call your attention to the words of the certificate of acknowledgment in Exhibit 12 for identification, to certain words struck out and to the words, "The managing editor of the Sun Printing and Publishing Company." Will you state what conversation you had with Mr. Lord at the time of the taking of that acknowledgment which led to the insertion of those words in your certificate?

Objected to, that the witness has testified on the direct and as to what he claims that Mr. Lord said to him; that it is improper on the redirect.

The COURT: I consider it insufficient for the reason that what he said covers the whole subject. I should allow him to testify if desired that previous to making those interlineations he had
101 some conversation with Mr. Lord and if he made those interlineations in consequence of those I allow him to state so. That would be for the purpose of showing that it was not an arbitrary change by the witness himself. But attendant statements by Mr. Lord himself at that time should not come in to modify the certificate itself.

Mr. BARTLETT: I object to the question as incompetent, improper, irrelevant and immaterial; and on the specific ground that the respondent cannot be bound by any statement made by Mr. Lord.

The COURT: I sustain the objection as to asking what the conversation was. But if counsel wishes to ask him whether those interlineations were made by him in consequence of a conversation had with Mr. Lord before he made them I allow that.

Mr. HUGHES: I except to the ruling of the court.

Q. I ask you to explain the interlineations in the certificate of acknowledgment of the words "Managing editor of the Sun Printing and Publishing Association"?

Objected to. Objection sustained.

Q. Did you insert the words "The managing editor of the Sun Printing and Publishing Company" in the certificate of acknowledgment in consequence of a conversation that you had with Mr. Lord?

A. I did.

Q. At the time of the acknowledgment?

A. I did.

Q. Please state what you said to Mr. Lord and what he said to you which——

Objected to.

The COURT: I sustain that on direct examination. If Mr. Bartlett wants to ask that by way of cross examination he can do it.

Mr. HUGHES: We except.

102 HAROLD M. ANDERSON, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. Where do you reside?

A. In New York city.

Q. What is your occupation?

A. Reporter.

Q. For what paper?

A. The New York Sun.

Q. How long have you been such reporter?

A. For four years on the 1st of May.

Q. Four years last past?

A. Yes, sir.

Q. Where were you employed by the respondent The Sun Printing and Publishing Association in the summer of 1898?

A. In the West Indian waters, Cuba.

Q. Were you on the yacht *Kanapaha?*

A. I was.

Q. When did you go aboard the yacht *Kanapaha?*

A. On the day she sailed from New York for Key West.

Q. What date was that?

A. I don't remember the date.

By the COURT:

Q. When was it?

A. I think it was the first of April, I am not sure about that.

Q. And remained until when?

A. I remained on the *Kanapaha*, being at times on shore and at times on other ships, until the latter part of July.

By Mr. HUGHES:

Q. With whom did you go on board?
A. I went alone from here.
Q. Did you go down with Capt. Packard when the yacht was taken?
A. Yes, sir.
Q. You were present when it was delivered?
A. Yes, sir.
Q. And did you see Petersen, the ship-keeper, at that time? Did you see a man there who had been in charge?
A. I knew him as Olaf, yes, sir; I only knew his first name.
Q. You knew him as Olaf?
A. Yes, sir.
Q. You went on board that same night, didn't you?
A. I went on board the night she was ready to sail.
103 Q. Do you know she was coaled and provisioned during the time intervening between the time you went down with Capt. Packard and when she sailed?
A. I didn't go down with Capt. Packard, I went on board afterwards, she was all ready to sail when I went on board.
Q. What other representatives of the Sun, that is, reporters were on board?
A. Mr. Chamberlin was at the pier but he did not go on board.
Q. When did Mr. Chamberlin go on board the *Kanapaha?*
A. He came on board the *Kanapaha* in Guantanomo bay some time in along the middle of June.
Q. Was Mr. Spears on the yacht at the start?
A. No, sir, not when she left here.
Q. He was a reporter of the Sun?
A. Yes, sir.
Q. When did he go aboard of her?
A. In Key West harbor.

By the COURT:

Q. About what time?
A. For good he went aboard of her on the day before Sampson's fleet sailed, I think the 20th of April, I am not sure about the date.

By Mr. HUGHES:

Q. How long did he remain on board of her?
A. He remained on board of her until the latter part of May.
Q. When did you leave her?
A. I left her in July, the latter part of July.
Q. And except for brief intervals you were on her continuously from about the 2d of April to the last of July?
A. Yes, sir.

By the COURT:

Q. And Chamberlin was not on her until after the middle of May?
A. Until after the middle of June.

By Mr. HUGHES:

Q. Who detailed you to go on board the *Kanapaha?*
A. Mr. Lord.
Q. And when?
104 A. It was two days before she sailed I think. I was first detailed to go on another ship which we didn't charter.
Q. Then the latter part of March, the 29th or 30th of March, you were told to get ready to go on the *Kanapaha?*
A. I wasn't told to get ready to go on the *Kanapaha*, I was told to get ready to go south on a ship.
Q. To report for the Sun?
A. That wasn't said. Of course that was understood.
Q. You were in the regular employ of the Sun at that time?
A. Yes.
Q. I understand when you left New York there was no other reporter of the Sun on board?
A. No other.
Q. Did you give directions to Capt. Packard where to go?
A. I told him to go to Key West. I beg your pardon, I did not, he was told by some other person to go to Key West.
Q. Do you know who told him to go to Key West?

Mr. BARTLETT: Don't answer unless you know.

A. I don't know.
Q. Did you go to Key West direct?
A. With two stops for supplies.
Q. Where did you stop?
A. We stopped at—we got into a gale and went into some little town in Carolina, I have forgotten where, and then we went to Charleston.
Q. Did you direct the captain to go to Charleston?
A. No, sir, I did not.
Q. Do you know who did?
A. He was sailing master and he took the ship.
Q. Where did you go from Key West?
A. From Key West we went to the north coast of Cuba.
Q. Who was on board, what reporter of the Sun, besides yourself at that time?
A. Mr. John R. Spears.
Q. Who directed the movements of the yacht after Mr. Spears came on board?
A. Mr. Spears.
Q. And the captain went from place to place in accordance with Mr. Spears' instructions?
A. Yes, sir.
105 Q. You didn't give any directions in regard to the boat?
A. Except as I carried them from Mr. Spears to the captain.
Q. You did that frequently?
A. Yes, sir.

Q. Was Mr. Spears away from the boat any of this time?

A.-Whenever we touched port he was away but never for any length of time.

Q. Did you give any directions in his absence as to the movements of the yacht?

A. At that time he wasn't absent when the yacht was doing anything.

Q. Did you at any time give direction as to the movements of the yacht in his absence?

A. I did after Mr. Spears left the yacht.

Q. That was for what time?

A. The latter part of May.

Q. For how long a time did you give directions with regard to the places which the yacht should go to?

A. From the time we left Key West harbor until the time Mr. Chamberlin came aboard.

Q. That was from the latter part of May——

A. Until the middle of June.

Q. Was there anybody else on board the yacht who gave directions as to what places she should go to except yourself during that time?

A. No, sir.

Q. You were in correspondence with the Sun during this period you were on the yacht, were you not?

A. Yes, sir.

Q. Both by letter and wire?

A. Yes, sir.

Q. And continuously I suppose day by day sending reports?

A. Continuously as we could, yes, sir.

Q. And you watched the movements of the fleet?

A. Yes, sir.

Q. And cruised about to get information for the Sun relative to the Cuban insurrection prior to the outbreak of the war and in regard to the progress of the war?

A. Never attempted to get any information in regard to the Cuban insurrection, simply in regard to what the United States forces were doing there.

Q. I mean prior to the declaration of war you were watch-
106 ing affairs there?

A. Prior to the declaration of the war we were in Key West watching the preparations of the United States troops.

Q. And reporting to the Sun?

A. Yes, sir.

Q. You were there for that purpose, I suppose?

A. Yes, sir.

Q. Were the reporters of any other newspapers on the yacht *Kanapaha* during the time you were on her?

A. Yes, sir.

Q. What papers were represented?

A. The New York Press, the Scribbs and McRae.

By the COURT:

Q. What is that?
A. That is a news association that owns several newspapers.
Q. They had a reporter, each one of these?
A. Yes, sir, and the Harper's Weekly.

By Mr. HUGHES:

Q. Who else?
A. And that is all I think.
Q. What was the name of the man from Harper's Weekly?
A. Carleton T. Chapman.
Q. He was an artist, was he not?
A. Yes, sir.
Q. Was he on all the time you were?
A. Yes, sir.
Q. Went from New York with you?
A. No, sir, he was not, he joined us in Key West.
Q. At the same time Mr. Spears came on?
A. Yes, sir.

By the COURT:

Q. Did you leave him on board when you left?
A. Yes, sir, when I left the ship.

By Mr. HUGHES:

Q. Scribbs and McRae had whom on board?
A. At various times there were various men there. When we started out Mr. Rickey was the reporter, and——
Q. Rickey?
A. Rickey. And afterwards there was a man named Steep, there were others at various times whose names I didn't know.
Q. And the reporter of the New York Press was ——
A. Mr. Henry Tholens.
107 Q. Was he on all the time you were there?
A. Yes, sir.
Q. Did you have anything to do with the payment of expenses of the ship?
A. Yes, sir.
Q. Did you advance any money to Captain Packard, or pay any money to him?
A. I don't remember about Captain Packard, I don't think that I did. Mr. Spears was in charge of the ship the entire time that Captain Packard—that is I did in Charleston, I advanced money to Captain Packard, and also in another port we touched at before Mr. Spears came on.
Q. Before Mr. Spears came did you advance to Captain Packard on account of his wages?
A. No, sir.
Q. On account of what?
A. On account of the expenses of the ship.

Q. Do you know how Captain Packard got his wages during that time?

A. I do not.

Q. Do you know whether they were subsequently paid by Mr. Spears?

A. I do not.

Q. You advanced the money for the expenses of the ship and got the money from the Sun I suppose?

A. Yes, sir.

Q. Made up your accounts and sent in your vouchers?

A. Yes, sir.

Q. To whom did you address your reports and correspondence?

A. The Sun, New York.

Q. Always that address?

A. Yes, sir.

Q. Was Acton Davies on the boat at all while you were there?

A. No, sir.

Q. You don't remember him?

A. I was on the boat—only at intervals he used to come aboard and call on us.

Q. He wasn't detailed to go on board?

A. No, sir.

Q. He was a reporter of the Sun?

A. On the Evening Sun, yes, sir.

Q. When were you first instructed to get ready to go south to observe the movements of the United States forces?

108 Mr. BARTLETT: We have wasted half an hour in proving facts that are entirely immaterial. What difference does that make?

The COURT: Why not go into these details?

Q. To whom did you send your bills?

A. My personal expenses were paid by money which was advanced to me before I left and the bills of the ship were paid by drafts.

Q. Drafts drawn on the Sun?

A. Drafts drawn on the Sun.

Q. You rendered an account for all money furnished you to the Sun?

A. I rendered an account for as much as I was able to but a great many of my bills went down and were lost.

Q. You accounted to the Sun?

A. I accounted to the Sun.

Q. And to nobody else?

Objected to.

Q. When did you first receive instructions as to going south to observe the movements of the forces of the United States for the purpose of correspondence with the Sun on its behalf?

Objected to as irrelevant and immaterial. Objection sustained. Libellant excepts.

No cross-examination.

Mr. HUGHES: We offer in evidence the deposition of Harry Gasper, a witness for libellant examined *de bene esse*.

Objected to.

The COURT: Then you must prove his inability to be present.

109 EDWARD I. WOLFE, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. What is your occupation?
A. Law clerk.
Q. For whom?
A. Zabriskie, Burrill & Murray.
Q. Do you know Harry Gasper?
A. Yes, sir.
Q. Have you seen him recently?
A. I saw him yesterday morning.
Q. Where did you see him?
A. At No. 5 Hamilton avenue, Brooklyn.
Q. Where was he?
A. He was ill in bed.
Q. Was he unable to leave the bed?
A. He said he was.

Mr. HUGHES: We offer to read in evidence the deposition.

Mr. BARTLETT: We object.

By Mr. BARTLETT:

Q. Are you a physician?
A. No, sir.
Q. Are you a surgeon?
A. No, sir.

Mr. BARTLETT: I don't think he knows anything about it.

By the COURT:

Q. Did you go there for the purpose of subpœnaing him?
A. No, sir.
Q. What led you to his room?
A. I was sent over to see whether he could appear, to see whether he was in town or not.
Q. What time of day was it that you were there?
A. It was about quarter past ten in the morning.
Q. He told you he was sick, did he?
A. Yes, sir; he said he had been ill for about a week.

The COURT: Isn't that reasonably satisfactory, Mr. Bartlett?

110 Mr. BARTLETT: I am willing to admit the deposition subject to all objections as appear in the deposition itself.

Mr. HUGHES: You take my statement as to Petersen and Gasper, Mr. Bartlett, and I will take your statement as to Atkinson.

Mr. BARTLETT: We offer in evidence now the deposition of Stephen B. Atkinson.

HARRY GASPAR, called as a witness on behalf of the libellant, being duly sworn, testified as follows:

By Mr. HUGHES:

Q. What is your occupation, Mr. Gaspar?
A. Assistant engineer.
Q. Where are you employed at present?
A. I have not worked for a week; last one on the steamship *Winifred.*
Q. Were you ever employed upon the yacht *Kanapaha?*
A. Yes, sir.
Q. When?
A. I joined her the 18th day of May last.
Q. 1898?
A. Yes.
Q. Where did you join her?
A. Key West.
Q. Had you ever been on her before?
A. No, sir.
Q. Who were on the yacht when you joined her?
A. I couldn't name all hands.
Q. Who was the captain?
A. Capt. Packard.
Q. Who was the mate?
A. Mr. Seaman.
Q. In what capacity were you employed?
A. I was employed as an oiler.
Q. Who was the engineer?
A. Mr. Davis, chief engineer.
Q. At the time you went on the yacht were there any persons on board other than the crew?
A. Yes, sir; newspaper men, I suppose.
Q. Who were they?
A. I couldn't name only one; that was Mr. Speers.
111 Q. Remember seeing Mr. Anderson?
A. Yes, sir.
Q. Remember seeing Mr. Chamberlin?
A. Yes, but not at that time.
Q. Did you remain on the yacht for some time after you joined her?
A. Yes.
Q. How long?
A. Up until she ran ashore, when we lost her.
Q. When was that?
A. 5th of September, 1898.
Q. Did you remain on the yacht continuously during that time?
A. Yes, sir.
Q. Where did she go from Key West when you boarded her?
A. She made a run across and around the coast, around Havana to the eastward and westward among the fleet and then back again to Key West.

Q. Did she put in Key West frequently?
A. Only once while I was on her.
Q. Do you remember being off Santiago?
A. Yes, sir.
Q. Remember the sinking of the *Merrimac?*
A. I remember it, but I couldn't give you the date.
Q. Do you remember where the yacht was at that time?
A. No.
Q. Do you remember the yacht's going to Kingston, Jamaica, with the report of the sinking of the *Merrimac?*
A. Yes.

Mr. BARTLETT: I move to strike out that answer, the question suggesting an answer to the witness and assuming a fact not proved.

The WITNESS: I only know we went to Kingston; that is all.

Q. You remember going to Kingston shortly after the sinking of the *Merrimac?*
A. Yes, sir.
Q. Do you know what sort of weather your had on your way to Kingston that time?
A. I do not know; have made too many trips; can't tell about that.
Q. How long was Capt. Packard captain after you went on the yacht?
A. One trip; one cruise back to Key West; he left at Key
112 West; after I joined her he made one trip and then he came back to Key West, and he was through then.
Q. Who became captain then?
A. Capt. Seaman.
Q. Did he remain captain until the loss of the yacht?
A. No, sir.
Q. How long did he remain captain?
A. Couldn't tell you the date at all.
Q. Who succeeded him?
A. Captain Atkinson.
Q. Where was Capt. Atkinson taken on?
A. I couldn't be positive where Capt. Atkinson came on board; but I know where Capt. Seaman left, that is all.
Q. How long before the loss of the yacht did Capt. Atkinson become captain, about how long?
A. Well, I should say two months; something like that; I couldn't say positively as to that.
Q. While you were on the yacht do you remember hearing any one giving instructions to the captain?
A. No, sir.
Q. Remember hearing any one say to the captain about where they should go, what port you should put in at?
A. I don't understand that hardly.
Q. (Question repeated.)
A. I can't understand that.

Q. What did Mr. Chamberlain do on the yacht?
A. He was in charge of the yacht, what we call head reporter; I don't know what they call them here.

Mr. BARTLETT: I move to strike out that answer as incompetent, improper, irrelevant and irresponsive, and not called for by the question.

Q. What did you see Mr. Chamberlain doing on the yacht?
A. I see him boarding the ships, returning agin.
Q. Going ashore and returning again?
A. Yes, sir.
Q. Do you remember hearing him talking with the captain?
A. Nothing more than he would to any one else; used to speak to all of us.
Q. Don't you remember hearing him tell the captain, where he wanted to go?
A. No, sir.
Q. You said a few moments ago that Mr. Chamberlain was in charge of the yacht; what did you mean by that?
113 A. He was supposed to be head man on it, what we called the head reporter; that is what we had amongst ourselves, what we would call boss.
Q. What did he do to indicate that he was boss?
A. He was the head man; if we wanted any money we used to go to him to get it.
Q. Did you go to Chamberlain for money?
A. I did once.
Q. What else did Mr. Chamberlain do besides giving money to show that he was the head man?
A. Nothing in our department whatever.
Q. What did you see him do in other departments? What did you observe?
A. I never observed him doing anything. In our department he has come and say, "Hurry up a little, boys; hurry up a little."
Q. Where did you hear Mr. Chamberlain say "Hurry up"?
A. In the engine-room.
Q. Giving orders to the engineer or to you?
A. He said, "Hurry up, I want to make time," or something like that.
Q. Did you hear him say anything to anybody else on the boat in regard to it?
A. No, sir.
Q. What was the speed of the boat?
A. All we can get.
Q. What did you get?
A. Sometimes ten and sometimes twelve.
Q. How long had Chamberlain been on board before the boat was lost? I mean how long a time had he been on the yacht?
A. I couldn't say about that; I should judge about two months, something like that.

Q. I think that you said that Mr. Speers was on part of the time that you were there?
A. Yes.
Q. How long was he on?
A. One trip only.
Q. What did you see Speers do?
A. See him doing nothing.
Q. He did something while he was on board that you observed?
A. No, sir; nothing in my line of business; what he done on deck I know nothing about.
Q. Did you see anybody on the boat besides Anderson, Speers and Chamberlain, outside of the crew? Were there others there?
A. Oh, yes; seen others.
114 Q. I mean who were on the boat for some little time, several days or weeks?
A. I never see them there for weeks; I see different men there every day, five or six, or a dozen perhaps.
Q. Who were on the yacht when you were off cruising? There were some men on the yacht besides the crew and besides Anderson, Chamberlain and Speers, weren't there?
A. Sometimes one and sometimes two.
Q. Do you remember some of their names?
A. No, sir.
Q. Were they newspaper men?
A. Supposed to be, for all I know; we all thought they were.
Q. Were you paid after the loss of the yacht for your services?
A. What do you mean by that?
Q. You got some money, didn't you, for your services?
A. I received my pay up to the date she was lost.
Q. Where did you get it?
A. In the Sun office.
Q. In New York city?
A. Yes, sir.
Q. You mean in the office of the Sun newspaper?
A. Yes.
Q. When were you paid?
A. I am not positive as to the date, but I think the first of October, 1898.
Q. Whom did you see at the Sun office?
A. Mr. Chamberlain.
Q. The same Mr. Chamberlain who was on the yacht?
A. Yes, sir.
Q. Did he pay you?
A. Yes, sir.
Q. And you were paid for the wages which you had earned on the yacht?
A. Yes.
Q. At this time that you went to the Sun office?
A. Yes, sir.
Q. You remember the time of the accident—I believe you have given the date, September 5, 1898?

A. Yes, sir.
Q. Were you on duty at that time?
A. No, sir.
Q. Where were you at that time?
A. I was in my room lying down.
Q. How long had you been off duty before the accident?
A. Probably twenty minutes, something like that.
115 Q. What was the time of the accident?
A. Twelve minutes to eight.
Q. In the evening?
A. Yes, sir.
Q. Where had you been up to within twenty minutes before the accident?
A. Working around deck, standing around deck.
Q. What had been the weather that day?
A. Very good weather indeed.
Q. Clear?
A. Clear weather.
Q. What had been the condition of the sea that day?
A. Smooth.
Q. What was the condition of the sea at the time of the accident?
A. Smooth sea, calm sea, very smooth.
Q. How was the wind?
A. The wind was aft, what little there was.
Q. Was there much of a wind?
A. Very little.
Q. At the time of the accident very little wind and for some time before that very little wind?
A. Very little wind all that day.
Q. What course had the yacht been taking just prior to the accident?
A. Don't know.
Q. What course?
A. I don't know nothing about courses; that is out of my line of business.
Q. Had you seen the land that day?
A. Yes, sir.
Q. When did you see land first that day?
A. We see it very nearly all day, since some time early in the morning.
Q. Did you keep in sight of land all day?
A. Yes, sir.
Q. And were you in sight of land at the time of the accident?
A. Yes, sir.
Q. How far off shore were you?
A. Well, I should judge two and a half miles.
Q. And how long had you been two and a half miles off shore?
A. I couldn't say. The last time I noticed the land, the last time I looked before dark was six, we were somewhere about three and a half miles then.

Q. At six o'clock on the same evening?
A. Yes.
116 Q. And the land was on which side of you?
A. On the port side.
Q. Where had you come from?
A. Cape Hayti.
Q. Had you anchored at Cape Hayti?
A. Yes, sir.
Q. Had you made any other landing since leaving Cape Hayti?
A. No, sir.
Q. Where were you bound for?
A. Havana.
Q. Through what channel?
A. Bahama channel.
Q. You say that there was an accident; what was the accident? We have been talking about an accident to the boat, what was it? Did the boat run on a reef?
A. Sure.
Q. Ran ashore?
A. Yes, sir.
Q. What speed was she making about the time of the accident?
A. Eleven and a half and twelve knots.
Q. What speed had you been making through that afternoon?
A. About the same speed.
Q. Do you remember about what time the sun set that evening?
A. No, I do not.
Q. What sort of an evening was it?
A. Very nice evening.
Q. Clear?
A. Clear evening.
Q. You remember the point called Gibara?
A. Yes.
Q. Did you notice that when you passed?
A. Yes.
Q. About what time did you pass Gibara?
A. Between two and three o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. Do you know how far Gibara was from Pt. Neuvitas?
A. I have an idea.
Q. What is your best idea?
A. My idea is about sixty miles.
Q. How near were you to Neuvitas at the time of the accident?
A. What do you mean—off Neuvitas harbor, the mouth of the harbor, or the city?
Q. The mouth of the harbor.
A. About six miles, I guess.
Q. In what direction did that lay from you?
A. Easterly direction; I couldn't say whether it was east.
Q. That is, the yacht was about six miles east of the harbor?
A. Yes, sir.

117 Q. Explain what occurred at the time of the accident, what you did, and what you saw others do?

A. I had my own troubles to look after, what I done myself.

Q. What did you do?

A. Went up and pulled my clothes on, and walked through in the engine-room, started the pump, that is, I see it was started, and remained there in charge of the engine-room while the chief went into his room to see to some of his affairs.

Q. How long did you remain in the engine-room?

A. It might have been half an hour.

Q. Where did you go then?

A. On deck.

Q. What did you do on deck?

A. I had nothing to do on deck.

Q. How long did you stay on deck?

A. I was up and down from there to the engine-room until we left, until the time we left.

Q. Did you see how far you were from land?

A. I couldn't tell how far; I couldn't see the land; I couldn't tell how far.

Q. You could see the land over on the port side, couldn't you?

A. Yes.

Q. You remained on deck for some time?

A. Yes, up and down from the time we went ashore until we left.

Q. When did you leave the yacht?

A. Twenty minutes past twelve.

Q. On the same night?

A. Yes, sir.

Q. All hands leave her at that time?

A. Yes, sir.

Q. Where did you go?

A. Went aboard the steamship *Albus*.

Q. Where did this steamer take you?

A. To Neuvitas.

Q. Did you go back to the place of the accident after that?

A. Yes, sir.

Q. How long after?

A. The third day.

Q. What did you observe at that time?

A. The ship was full of water then, that was all.

Q. Was she pounding?

A. A ship can't pound after it is full of water and on a reef.

118 Q. What did you observe about the reef? Did you see the reef and the water breaking over it?

A. Not on that day. We started on the first day after to go down; we couldn't get down.

Q. Why not?

A. Too rough. The sea was breaking over the reef.

Q. How far did you go that day?

A. We got down to within half a mile of the boat.

Q. And you saw the reef from there?

A. See it was breaking, and you couldn't get across it.
Q. Did you see the water breaking over the reef to the east of where the vessel was?
A. Yes, sir, all along.
Q. Over on the east side of where the vessel was?
A. From the eastward to the westward, both ways.
Q. I show you a chart——

Mr. BARTLETT: I object to the chart being shown the witness; the chart is not in evidence, not duly proven and not properly authenticated.

Q. I call your attention to it, and to the point marked Neuvitas del Principe; is that the Neuvitas point that you have mentioned?

Objected to as incompetent, immaterial and irrelevant.
The WITNESS: That chart is not like anything I have seen before.
Mr. HUGHES: I move to strike that out as irresponsive.

Q. I call your attention to this point, Point Neuvitas; is that the point that you have referred to as Point Neuvitas?
A. I can't tell from that chart.
Q. You say this first day; that was the first day after the accident when it was too rough to get all the way to the yacht?
A. Yes, sir.
Q. And you got how near, do you say?
A. Probably three-quarters of a mile, half a mile.
Q. Then you went back?
A. Yes, sir.
Q. Did you go out again the next day?
A. The boats went out; I didn't go myself.
119 Q. You went there the third day?
A. Yes, sir.
Q. That is the day you found the boat full of water?
A. Yes, sir.
Q. Where was she lying?
A. The same position as when she struck.
Q. Do you remember how the reef ran as compared with the shore, whether it wasn't at some angle with the shore?
A. It was an angle with the shore; I couldn't tell what angle.
Q. Was it an acute angle, small angle?
A. It might off the shore. Say the shore ran here (indicating) and the reef ran like this (indicating).
Q. Nearly parallel, but something of an angle.
A. That is it.
Q. Do you know what was done with the vessel after that? The third day when you saw her, was anything done?
A. No, sir, not to my knowledge.
Q. Do you know if the captain and all hands left her?
A. Yes, sir.
Q. She was abandoned, wasn't she?
A. Yes, sir.
Q. As a total loss?

A. Yes, sir; to the best of my knowledge; I couldn't say what was done with her.
Q. Did you go back to Key West after that?
A. Went into Key West harbor.
Q. You went back on the *Albus*, didn't you?
A. Yes, sir.
Q. Did the captain go back with you?
A. Yes, sir.
Q. All hands?
A. All hands, yes, sir.
Q. You were down in the engine-room for some little time after the accident; was there any one there with you?
A. The firemen and oilers were up and down.
Q. Then you came up on deck?
A. Yes, sir.
Q. Did you see the captain up there?
A. Yes.
Q. Did you hear him say anything about the accident?
A. No, sir.
Q. Nothing at all?
A. No, sir.
Q. Hear him say anything about striking the reef?
A. No, sir.
Q. Nothing whatever?
A. No, sir.

120 Cross-examination by Mr. BARTLETT:

Q. Mr. Gaspar, are you friendly with Capt. Atkinson, on good terms with him?
A. Very good terms.
Q. Always have been?
A. Always have been, yes, sir.
Q. What time was it that you were last on deck before the accident occurred? You say the accident occurred about eight o'clock.
A. Twelve minutes to eight.
Q. How long before had you been on deck?
A. I had been below twenty minutes.
Q. And was the captain on deck when you went below?
A. Yes, sir.
Q. Where was he—on the bridge?
A. On the bridge.
Q. When you came up after the accident did you find him on the bridge?
A. I didn't come up; I went through into the engine-room.
Q. But the last you saw of him before the accident, and some twenty minutes before that, he was on the bridge attending to his duties?
A. Yes, sir.
Q. In command of the boat?
A. Yes, sir.
Q. Was he a good seaman?

Mr. HUGHES: I object to that as incompetent, immaterial and irrelevant, and calling for a conclusion of the witness. He is not an expert.

A. As far as his business goes I don't know; I am not a captain.

Q. You don't know?

A. No, sir. I considered he was, in my judgment.

Q. In your judgment he was a good seaman?

A. Yes, sir.

Mr. HUGHES: I move to strike out that question and answer as calling for an opinion of the witness, and as incompetent.

Q. You have sailed on a good many steam vessels with captains, haven't you?

A. Yes, sir.

Q. For how many years?

A. Fifteen or sixteen.

Q. Practically a good part of your life has been under the captains of steam vessels?

A. Yes.

121 Q. And you have seen a good many in command of steam vessels?

A. Yes, sir.

Q. And you know their duties in substance?

Objected to.

A. No, sir; I do not know the captain's duties.

Q. Was it dark when the accident occurred?

A. Yes, sir.

Q. Were there any lights along the coast?

A. Hadn't seen any.

Q. Hadn't seen any lights along the coast?

A. No, sir.

Q. Was there anything to indicate the presence of the reef above the surface of the water?

A. No, sir.

Q. The reef was concealed?

A. Yes, sir.

Q. And it was some two miles and a half from the shore?

A. Yes, sir.

Q. And there was no buoy or anything to indicate the presence of a dangerous rock?

A. No, sir.

Q. And there was nothing on the coast by way of light or lighthouse or buoy or light vessel of any kind to indicate the presence of a reef or rock?

A. No, sir.

Q. The lights all along the coast had been removed, hadn't they?

Objected to.

A. I don't know all along the coast, but them two lights was out.

Q. What two lights do you refer to?
A. The Neuvitas Point pilot, or something like that.
Q. Up against Neuvitas harbor there should have been two lights?
A. Yes, sir.
Q. And there were two light-houses?
A. One light-house, and another light that they hauled up on a pole.
Q. Just tell us all you know about that; where was the light-house?
A. The light-house is on the starboard side going out.
Q. Right on the point of the harbor?
A. Yes, sir.
Q. On the starboard side?
A. Yes, sir.
Q. That is, a light-house used to be there?
A. Yes.
122 Q. And then on the other side of the harbor?
A. On the port side there is a light that they have to haul up on a pole.
Q. And on that night both of those lights were out?
A. Yes.
Q. There was no light in the light-house and no light on the pole?
A. No, sir.
Q. And was this reef off against Neuvitas harbor?
A. To the eastward.
Q. About due east?
A. I couldn't say about east, but I know it lay in an easterly direction from Neuvitas harbor.
Q. So that the lights would have been visible from the reef or from the point where the yacht struck if they had been burning?

Mr. HUGHES: Objected to as incompetent, calling for an opinion without a proper basis for it.

A. Yes, sir.
Q. When are you going away?
A. I don't know.
Q. Have you an engagement whatever to sail?
A. Last week I was sick all the week, and I was sent for three times. I may have a letter when I go over to the house tonight to come and go to work.
Q. But yesterday you had no engagement to go out?
A. No, sir.
Q. You hadn't been engaged to sail?
A. No, sir.
Q. And you don't know of any fixed engagement now?
A. Nothing fixed.
Q. How did they come to get you to testify here? Do you know how they got hold of you?
A. Certainly I know.
Q. Tell us all about it?
A. You see that Dutchman that was in here?

Q. The Swede?
A. Yes.
Q. Olaf Petersen?
A. Yes. He knew me and he happened to meet me in Hamilton avenue, in Brooklyn, the other night; and he had been over
123 here and some one asked him if he knew any one who was on the yacht the time she was lost, and he told him that he see the fellow that was first assistant, and he said bring him over, and he came and asked me if I would come over; I don't know who it was that asked him.
Q. Then you had not seen the lawyer, Mr. Murray?
A. I have seen him before.
Q. When?
A. Friday.
Q. Where?
A. Down at the office.
Q. And did you tell him then that you were engaged to leave town?
A. I told him I expected to go at any time; I couldn't tell him what time I would go.
Q. That was a sort of an indefinite engagement?
A. The same as I have now.
Q. That is, you will go when you can?
A. That is most any time I get ready.
Q. Now, who was the first engineer; the chief en-eer?
A. Frank Davis.
Q. Where is he?
A. At present employed in Luckenbacks Company, down in Broadway.
Q. Then he is in the city?
A. No, sir; he might be here one week and might not be here in three; an outside boat that tows from Norfolk to Boston.
Q. The towing company?
A. Yes, sir.
Q. And do you know any other men who were there with you?
A. At the time of the accident?
Q. Yes.
A. I know. Where they are, I don't know.
Q. Where do you live when you are here or in Brooklyn?
A. I sometimes stop in New York, sometimes in Jersey and sometimes in Brooklyn, but my address at any time is either 18 Broadway, care of Morse & Company, or No. 7 Hamilton avenue Brooklyn.
Q. The best average speed you could get out of this boat was 10 knots?
A. What do you mean by average? 24 hours?
Q. Running along for 24 hours.
A. That is about right, I guess.
Q. Were her engines in good order?
A. That is a question I can't answer.

124 Q. Well, you are an engineer?

A. Certainly. They might be in order to suit some, but they didn't suit me.

Q. That is what I want; your opinion.

A. In my opinion they would not suit me.

Q. How long have you been in this profession of engineer; some 15 years?

A. No, sir; I have been in steam vessels for that, but I have held an engineer's certificate for this is my seventh issue. It will be 8 years this coming June.

Q. How as to the boilers; the same thing? They wouldn't suit you?

A. No, sir.

Q. They were not first class, were they?

A. They was first class.

Q. Originally?

A. They was first class when I first joined the boat.

Q. But not afterwards?

A. No, sir.

Q. How big a reef was this upon which the yacht struck?

A. I couldn't say; it might be four miles or it might be six miles long; something like that; maybe more.

Q. It was a long reef?

A. Sure, it went off a long way along the coast.

By Mr. MURRAY:

Q. Six miles eastward of the vessel?

A. I couldn't say. I am just giving you my judgment. It might be six miles long, the whole length of it; it might be more or might be less.

By Mr. BARTLETT:

Q. Did you ever examine it carefully?

A. No, sir; I never did. I never expected to be questioned about it and never thought I would think about it any more.

Q. So you don't know?

A. No, sir.

Q. All you know is there was a reef upon which the yacht struck?

A. Yes, sir.

Q. You have stated originally that you did not know the direction in which the yacht was going. That is, the exact pointing of the yacht at the time of the accident?

A. That is, the exact course, you mean?

125 Q. Yes.

A. No, sir; I do not know.

By Mr. MURRAY:

Q. Coming down to the time of the accident, had you been expecting to see these lights before you struck?

Objected to as incompetent, improper, irrelevant and immaterial.

A. We were expecting to make a light. We didn't know but thought we ought to make the light.

Q. How long had you thought that before the accident?

Objected to as incompetent, improper, immaterial and irrelevant.

A. I was at that time thinking we ought to make them when they was lit at dark.

By Mr. HUGHES:

Q. As I understand it, you are going to sea just as soon as you can get a place?

A. If I am well enough to go I would have gone last week. I may go in a day or I may not go in two weeks.

Q. You will go just as soon as you are well enough and get a place?

A. Yes, sir.

Q. And have you been expecting to go on the boat which was about to come in from Boston?

A. Yes, sir.

Q. When is that boat expected to come in?

A. I could not say for that.

Q. Where is it expected that that boat will come—by you?

A. She may come to Erie basin, may come to Fletcher's, and may come to 9th street.

Q. Then will be bound for where?

A. Porto Rico.

Q. Have you had conversations with the captain of that boat?

A. No, sir; not lately.

Q. Well, I mean a little time ago?

A. He told a man to come and tell me. I didn't see the captain myself.

Q. You have got word about this vessel coming in?

A. Yes, sir.

Q. And you told Mr. Murray about that?

A. Yes, sir.

126 Q. What did you tell him?

A. I don't know now. I told him I expected to go away.

Q. On that boat?

A. Yes, sir; that was my expectation.

Q. You still expect to, don't you?

A. Yes, sir.

Q. As soon as she comes in?

A. If I am well enough, yes.

Q. And she is expected in now very shortly?

A. May be here today, and may be in three days, I don't know. The captain has gone after her.

Q. This gentleman who has been assisting Col. Bartlett, do you recognize him?

A. Which one?

Q. The gentleman with glasses.

A. No, sir.

Q. Who is the other gentleman?
A. Mr. Chamberlain.
Q. The Mr. Chamberlain that you have mentioned as being on the yacht *Kanapaha?*
A. Yes, sir.
Q. And who paid you at the Sun office?
A. Yes, sir.
Q. How did the coast look when you were on deck after you had struck that night; was it somewhat high?
A. Well, it was like all the Cuban coast down there; highland back, low on the coast.
Q. High near the coast?
A. No; high back from the coast.
Q. You could see it rising?
A. Yes, you could see it.
Q. And as I understand it, the day that you came out, the next day when you tried to make the boat, you could see the reef distinctly; water breaking over it?
A. Yes, sir.
Q. And I understand that for some time before the accident you had been looking for these lights at the mouth of the harbor?
A. I hadn't been looking for them.
Q. I don't mean personally, but you had been expecting to make them?

Objected to.
Question withdrawn.

By Mr. BARTLETT:

127 Q. The next day when you came out you saw the water breaking over the reef. You did not see the reef itself, did you?
A. You can't see the reef at all.

By Mr. HUGHES:

Q. You saw the water breaking over it?
A. I could see the sea breaking over the reef.
Q. You have seen reefs, haven't you, and you know the way water breaks over reefs, and so it was perfectly evident there was a reef there when you came out the next day, wasn't it?
A. There was a reef there all right. You couldn't lose that on the map.

128 United States District Court, Southern District of New York.

WILLIAM L. MOORE, Libellant,
vs.
THE "SUN" PRINTING AND PUBLISHING ASSOCIATION, Respondent.

NEW YORK, *March* 30, 1899.

Before Thomas Alexander, Esq., United States commissioner.

Appearances.

For the libellant, Chas. E. Hughes and Archibald Murray.
For the respondent, Franklin Bartlett.

Deposition of Capt. Stephen B. Atkinson, taken on behalf of the respondent, by consent, with the same force and effect as though taken by order of the court.

STEPHEN B. ATKINSON, called as a witness on behalf of the respondent, being duly sworn, testified as follows:

By Mr. BARTLETT:

Q. Capt. Atkinson, what is your business or occupation?
A. Master mariner.
Q. How old are you?
A. 59 years old.
129 Q. How long have you been engaged in your present occupation? How long have you been occupied either as a master or in connection with seafaring?
A. 40 years.
Q. Been a seafaring man for 40 years?
A. Yes.
Q. How long have you been a master man?
A. 25 years.
Q. When did you arrive in New York this time?
A. Monday—last Monday.
Q. Are you about to leave New York today?
A. I leave New York this evening on the Fall River boat.
Q. And you do not know when you will return?
A. No.
Q. Do you know the yacht *Kanapaha?*
A. Yes, sir.
Q. Were you on the yacht *Kanapaha* in the summer and autumn of 1898?
A. Yes, sir.
Q. In what capacity?
A. Master.
Q. How long were you master of the yacht *Kanapaha*, approximately?
A. Well, I don't remember the dates exactly; but I took charge of her some time in June, and I think I lost her on the 5th of September. I left New York on the 2nd of June, I think.

Q. How were you engaged as master of the *Kanapaha?* What did you first know about it? Did you receive a communication from any one?

A. From Mr. Manning, of a yacht broker's office.

Q. From Mr. Thomas Manning?

A. Yes, through that office.

Q. You received a written communication?

A. I received a telegraphic communication from the office.

Q. And you went to Mr. Manning's office?

A. No; I was met by one of Mr. Manning's clerks on the street in New York.

Q. Some time in June, 1898?

A. Some time in June, 1898.

Q. And then thereafter did you go to Key West?

A. I took the train the next morning from here direct to Key West.

Q. And when did you take command of the yacht?

A. I don't remember the exact date.

Q. Shortly thereafter?

130 A. Some time in June; I think it was the 4th or 5th. I went from New York direct to Key West; then I took passage from Key West to Santiago.

Q. Where did you take command of the yacht?

A. In Guantanamo bay or Santiago.

Q. This yacht was built of iron?

A. Yes.

Q. What was her tonnage? You can look at your report.

A. About 123 tons, or somewhere in that neighborhood, net. I think (looking at paper) it is 123 tons down here. I don't keep those things in my head at all.

Q. What did you do after you took command of the boat?

A. Well, I carried out the instructions of my employer.

Q. I would draw your attention to the early part of September, 1898.

A. We were lying at Ponce in Porto Rico; I received orders from my manager to proceed to Havana.

Q. Was that about the 2nd of September?

A. Yes, 2nd—no, it would be a little previous to that.

Q. When did you leave Ponce?

A. We grounded on the 5th; we must have left either the 30th or the 1st; I am not sure of those dates at all.

Q. Somewhere about the 1st of September, 1898?

A. Yes.

Q. Left Ponce bound for Havana?

A. Yes, sir.

Q. What was your course? Where did you go?

A. I proceeded direct from Ponce.

Q. When did you pass Cape Haytien?

A. We coaled at the port of Cape Haytien.

Q. When was that?

A. I think that would be on the 3rd of September; I am not

certain whether we left on the morning of the 4th or the evening of the 3rd—it would be the evening of the 3rd.

Q. When did you pass Cape Rebecca?

A. We passed Rebecca about noon of the 5th.

Q. What was your course after leaving Cape Rebecca?

A. I don't remember the exact courses now, but you will find them in my report made and delivered at New Orleans.

131 Q. Is this your report (showing witness a paper)?

A. No, sir.

Q. Is it a copy of your report?

A. This seems to be only an abstract of the report; there is no copy here of the report.

Q. What took place on the 5th day of September, 1898?

A. On the 5th day of September, about 7.30 or 7.45—I don't remember the exact time—we grounded about seven miles east of Nuevitas, the north side of Cuba; very dark at the time; sea smooth.

Q. Were you on deck at the time?

A. Yes, sir; not on the bridge exactly at the time, but had just left the bridge a minute or two before; and I was in the pilot-house right under the bridge at the time she struck.

Q. Was the vessel proceeding at her usual course of speed?

A. Yes, about twelve knots, the usual speed.

Q. Was the usual lookout on the boat?

A. Yes.

Q. Where was the lookout?

A. A man was forward, and a man at the wheel, and an officer on the bridge.

Q. The usual lookout?

A. Yes.

Q. At the time of the grounding did you think that your course was safe?

Mr. HUGHES: That I object to as incompetent and irrelevant, calling for the opinion of the witness and leading.

Q. Do you think your course was safe or not?

Same objections.

A. I had no doubt of it.

Mr. HUGHES: I move to strike out the answer of the witness on the same grounds.

Q. You supposed your course was safe?

Mr. HUGHES: Same objections—incompetent and irrelevant, calling for an opinion of the witness, and leading.

A. I certainly supposed my course was safe, or I shouldn't have steered it.

132 Mr. HUGHES: I move to strike out the answer on the same grounds.

Q. Why did you think your course was safe?

Mr. HUGHES: Same objection—incompetent and irrelevant, and calling for a conclusion of the witness. The question should be directed as to matters of fact.

A. My reasons for thinking my course was safe, that I had passed Cape Rebecca about six miles distant, that I had laid the course to carry me into the old Bahama channel in safety, and I was running this course, and I had no reason to believe that anything was wrong, knowing that the compasses were correct.

Q. You say you had passed Cape Rebecca—how long before?

A. About six miles distant; some time in the early part of the day.

Q. You mean by "six miles distant," six miles distant from Cape Rebecca?

A. From Cape Rebecca.

Q. When the vessel stranded?

A. My supposed position would be six miles—my position, according to my reckoning, would be six miles distant from Matternilis point.

Mr. HUGHES: I move to strike out the statement of the witness as to his supposed position at the time of grounding, on the ground that it is incompetent and irrelevant.

Q. When you were off Cape Rebecca how far were you from shore?

A. Six miles, in my judgment.

Q. How far was Cape Rebecca from the point where you stranded, about?

A. I don't remember.

Q. You passed it early in the day?

A. Yes.

Q. You passed Cape Rebecca early in the day?

A. Yes.

Q. And you had been steaming at about what rate of speed?

A. About twelve knots.

Q. What did you do about directing your course after you passed Cape Rebecca?

133 A. I had nothing, only revised my course from time to time to carry me into the old Bahama channel.

Q. And about how far from shore?

A. My course would put me six miles off Matternilis Point reef.

Mr. HUGHES: I move to strike out his answer as to what his course should be, on the ground that it is incompetent and irrelevant; the question should be as to the exact position of the boat.

The WITNESS: I didn't answer exact position; I said supposed position of the boat.

Q. What was the cause of the stranding of the yacht *Kanapaha*?

Mr. HUGHES: I object to that as incompetent and irrelevant, calling for the opinion and conclusion of the witness, instead of making inquiry as to the facts.

A. I refer you to my report, handed to the local inspectors at New Orleans. My reasons for the stranding of the boat was, in the first place, an unknown current; in the second place, the non-lighting of the lights at Matternilis.

Q. At the light-house at the entrance to the harbor?

A. Not exactly at the entrance of the harbor; at Matternilis Point reef.

Mr. HUGHES: I move to strike out what the witness has said as to his reasons being an unknown current and a non-lighting of the lights.

Q. I will ask you the direct question: What were the causes of the stranding of the boat?

Mr. HUGHES: That I object to as incompetent and irrelevant, and calling for the opinion and conclusion of the witness as to the cause instead of the facts, so that the court can reach its own conclusion.

A. The causes in my opinion were, first, an unknown
134 current; second, the non-lighting of the light-house; and, third, an imperfect chart of the coast.

Mr. HUGHES: I move to strike out the answer of the witness on the same grounds.

Q. State what you know about the currents.

A. My chart gave no instructions as to currents at all.

Mr. HUGHES: I object to that as incompetent and irrelevant; the chart not being produced the witness' statement as to its contents not being competent.

The WITNESS: But from other sources I know there is a current.

Mr. HUGHES: I move to strike out the testimony of the witness, that from other sources he knows that there was a current, as hearsay and incompetent and irrelevant.

Q. Did you know prior to the stranding of the *Kanapaha* of any currents at the place where she run on the reef?

A. No, sir.

Q. Had you been informed prior to the stranding of any currents at that point?

Objected to as incompetent and irrelevant.

A. No, sir.

Q. State what you know about the failure of lights or of the light-house to be lit. Where was the light-house?

A. At Matternilis point, about two miles west of the entrance to Nuevitas, to the harbor of Nuevitas.

Q. Was the light lit on that night?

A. No, sir.

Q. What had you been informed—what had you learned concerning the lights on the Cuban coast before you left Ponce? What had you been informed?

Mr. HUGHES: That I object to as incompetent and irrelevant and calling for hearsay.

A. I had been informed that the lights on the north side of Cuba were all relit and were burning.

Mr. HUGHES: I move to strike out the answer on the same grounds.

135 Q. Who informed you?

Same objections.

A. The customs authorities in Ponce, Porto Rico, had instructions from New York.

Mr. HUGHES: I move to strike out the answer, that the customs authorities at Ponce had instructions from New York, as incompetent and irrelevant.

Q. And you were so informed by the customs authorities at Ponce, Porto Rico?

Objected to on the same grounds.

A. Yes, sir.

Q. If the light had been burning would the stranding have been avoided?

Mr. HUGHES: I object to that as hypothetical, and calling for the opinion of the witness, and as incompetent and irrelevant.

A. The stranding would have been avoided.

Mr. HUGHES: I move to strike out the answer on the same grounds.

The WITNESS: That is what lights are for.

Mr. HUGHES: I move to strike out the statement of the witness as not responsive.

Q. Was that a large light-house at this point?

A. Yes, sir.

Q. It could be seen how far at sea?

A. I think seventeen miles, seventeen or eighteen miles. I know that it could be seen from where I was at dark if it was lit.

Q. And at dark did you see any light?

A. I did not see it.

Q. Did you see any light at any time while you were along that coast?

A. I saw all the other lights excepting this along the coast. There are many.

136 Q. State the other lights which you saw burning on that night along the coast.

A. The only light I saw was at Cape Maysi. I saw some after leaving Nuevitas on the Norwegian steamer *Albus*.

Mr. HUGHES: I move to strike out the last part of the answer, as it refers evidently to a time after the occurrence in question.

The WITNESS: From my knowledge and the knowledge I gained

while I was there, this Matternilis Point light and the light what they call the Eastern Point light were the only two lights that were not exhibited on that night. The lamps had been destroyed by the Spaniards and our Government not knowing this had not furnished lights.

Mr. HUGHES: I move to strike out the answer as hearsay and incompetent and irrelevant.

Q. Tell us, Captain, what you know of your own knowledge about the condition of those two light-houses.

A. On the night in question I know of my own knowledge that the lamps had been destroyed by the Spanish soldiers and had not been replaced and relighted.

Q. Did you visit the light-houses?

A. Yes, on the Eastern point at the entrance to Nuevitas, on the following day. I was shown by the police the lamps that had been destroyed.

Mr. HUGHES: I move to strike out the statement of the witness as to the destruction of the lights that had belonged at this place, and as to the information given to him on the day after the accident from the persons whom he found at the light-house, as incompetent, irrelevant and immaterial, and as hearsay.

Q. And you were shown the broken lights there?

Objected to as leading and incompetent and irrelevant.

A. Yes, sir.

Q. Was the night dark at the time the vessel struck?

A. Very dark, yes.

137 Q. But no fog?

A. No fog.

Q. So that if a light had been burning it could have been readily seen?

Mr. HUGHES: That I object to as hypothetical, calling for an opinion of the witness, and incompetent and irrelevant.

A. It was a very fine night for seeing a light; the night was very dark, very fine.

Q. Were you familiar with that part of the coast?

A. Yes, sir; I had navigated that channel on several occasions previous to this.

Q. Did you always find those two lights burning before?

Objected to as incompetent and irrelevant.

A. Yes.

Q. What two lights do you refer to now?

A. I refer to the light at the entrance of Nuevitas harbor and the Matternilis Point light only about two miles to the westward.

Q. And those were the two lights which were not burning that night?

A. Yes.

Q. Was there anything to indicate the presence of the reef on that night?

A. Not anything.

Q. Was the water smooth?

A. Perfectly smooth. Had there been any sea on I would have seen the reef.

Q. How far was the reef from the shore?

A. Two miles.

Q. And the surface of the water was unbroken at the time?

A. Yes, sir.

Q. It appeared like a smooth sea?

A. As smooth as that floor there (pointing to floor of court-room).

Q. That is, the sea all around the reef?

A. Yes.

Q. Was there anything of any sort, any buoy or any light vessel to indicate to you the presence of the reef?

Mr. HUGHES: That I object to as leading. The witness should be asked what he saw.

Q. I want you to tell me what you actually saw. Was
138 there any light-house or any light-vessel or any buoy or anything of any sort on the surface of the water along the reef where the vessel struck?

Same objection.

A. There was nothing.

Q. The sea was smooth at the time?

A. Yes.

Q. And what way was the wind?

A. Northeast trade; light air from the northeast at the time.

Q. What chart did you have on board of the vessel? Was it a United States chart?

A. Yes; issued by the United States Government.

Q. And was it the latest chart issued by the United States Government?

A. I couldn't say as to that. It was a chart called the western section of Cuba, taking in nearly the whole island of Cuba, excepting a small piece on the eastern end.

Mr. HUGHES: I object to that upon the ground that the chart should be produced; the testimony of the witness is not the best evidence.

Q. Did the chart indicate the reef?

Same objection.

A. No, sir.

Q. In what direction was the boat pointed at the time of the accident?

A. Northwest or northwest by west.

Q. And you steered her right along the shore?

A. Yes.

Q. At a distance of about six miles along the shore?
A. The supposed distance.

Mr. HUGHES: I move to strike out that answer.

Q. How did you lay your course out after leaving Cape Rebecca?
A. The usual method.

Mr. HUGHES: I move to strike that out.

Q. What was the usual course?

A. You can find my course in my report issued in New
139 Orleans. I can't remember. It was somewhere northwest, or west-northwest by half west, or northwest by half west, or northwest by quarter west.

Q. How far from the shore would that have kept your boat?
A. Six miles.

Mr. HUGHES: I move to strike out his answer the distance that would have kept his boat from shore, as incompetent and irrelevant.

Q. Did you keep to that course as laid out by you?

Objected to.

A. All I have got to say is, that I was steering what I supposed to be a correct course for entering the old Bahama channel. If anybody doubts that I can't help it.

Mr. HUGHES: I move to strike out what the witness supposed to be the correct course as incompetent and irrelevant.

Q. Did you pass any vessel a short time before the *Kanapaha* struck?

Objected to as incompetent and irrelevant.

A. Yes; we passed a vessel in the afternoon steering pretty nearly the same course.

Mr. HUGHES: I move to strike out "steering pretty nearly the same course" as irresponsive, immaterial and irrelevant.

Q. What was the vessel which you passed?
A. The Norwegian steamer *Albus*, bound from New York to Nuevitas.
Q. What course was she steering when you saw her?

Objected to.

Q. What course was this Norwegian steamer steering when you passed her?

Objected to.

140 A. She was steering a course more westerly than I was steering, that is, more in shore from what I was steering.
Q. Did the *Albus* maintain that course?

Objected to as immaterial and irrelevant.

Q. Did she continue the same course after you passed her, or did she change it?

Same objections.

A. She changed her course after I passed her.
Q. In what way?
A. Continued to steer the same course that I was steering.
Q. That is off shore?
A. Yes; then she was following right in my wake at dark. She changed her course at six o'clock, when she was right at the stern of me, and changed her course to the same way I was going; in other words, she changed directly in my wake.

Mr. HUGHES: I move to strike out that answer as immaterial and irrelevant.

Q. At the time you passed her she had been steering more in shore?

Same objection.

A. Yes.
Q. After the *Kanapaha* struck did you see the *Albus?*

Objected to as immaterial and irrelevant.

A. Yes.
Q. How soon afterwards?

Same objection.

A. I saw her side lights right astern afterwards; she was about a mile astern of us.
Q. Did she approach you?
A. Yes.
Q. What happened then?
A. I put out a boat and pulled towards her.
Q. Did you go on the boat towards her?
141 A. Yes, for the purpose of warning them to change their course, and that we were ashore.

Mr. HUGHES: I move to strike out that answer as immaterial and irrelevant.

Q. Was the stranding of the *Kanapaha* in any way caused by any negligence on your part?

Mr. HUGHES: I object to that question as incompetent and immaterial, and calling for a conclusion on the part of the witness.

A. I didn't consider so at the time.

Mr. HUGHES: I move to strike out the last answer on the same grounds.

Q. Was it so or not?

Same objections.

A. No. I never knew a man who was willing to lose his vessel.

Q. Was the stranding of the *Kanapaha* caused by the negligence of any of the men under you or any of the employees on that boat?

Mr. HUGHES: I object to that as leading and as incompetent and irrelevant, and calling for a conclusion of and opinion of the witness.

A. No, sir.

Q. Were you familiar in 1898, and are you familiar now with the value of a steam yacht?

A. Yes, sir; I am fairly familiar with the value of steam yachts.

Q. You have seen a good many steam yachts?

A. I have been connected with steam yachts now for the last six or seven years.

Q. Have you just been in command of a steam yacht?

A. Yes, sir, the steam yacht *Eleanor*, formerly belonging of Mr. William A. Slater, of Norwich, Connecticut.

Q. Where did you leave her?

A. I left her in Nassau.

Q. She was sold by Mr. Slater to whom?

A. Mrs. Cardiza, of Germantown, Pennsylvania.

142 Mr. HUGHES: I object to this testimony as incompetent and irrelevant and improper, for the purpose of ascertaining the value of the yacht *Kanapaha*, and immaterial, and further as hearsay.

Q. For what sum was she sold?

Same objection.

A. About $125,000.

Q. What did she cost?

Same objections. Witness has not been shown familiar with its cost.

A. She cost about $300,000.

Q. She was a large boat, was she?

Same objections.

A. A boat of 800 tons gross.

Q. How old was this steam yacht *Kanapaha?*

Objected to as hearsay.

A. The records will show that. She is eighteen years old, about.

Q. Was there any electric-lighting plant on the *Kanapaha?*

A. None.

Q. Was there any ice plant on the boat?

A. None.

Q. On first-class, modern yachts do you find an electric-lighting plant?

Q. Did she continue the same course after you passed her, or did she change it?

Same objections.

A. She changed her course after I passed her.
Q. In what way?
A. Continued to steer the same course that I was steering.
Q. That is off shore?
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A. No. I never knew a man who was willing to lose his vessel.

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A. She cost about $300,000.

Q. She was a large boat, was she?

Same objections.

A. A boat of 800 tons gross.

Q. How old was this steam yacht *Kanapaha?*

Objected to as hearsay.

A. The records will show that. She is eighteen years old, about.

Q. Was there any electric-lighting plant on the *Kanapaha?*

A. None.

Q. Was there any ice plant on the boat?

A. None.

Q. On first-class, modern yachts do you find an electric-lighting plant?

Mr. HUGHES: I object to that as calling for a conclusion and opinion of the witness, as to what are first-class, modern yachts.

Q. On most modern steam yachts do you find electric-lighting plants?

Same objections.

A. Always.

Q. You know this from your experience?

A. Yes.

143 Q. And by having examined steam yachts?

A. Yes.

Q. Do you find an ice plant or refrigerating plant on modern steam yachts?

Objected to as immaterial and irrelevant.

A. Nearly all modern steam yachts have an ice plant; they are not considered modern unless they do have it.

Mr. HUGHES: I move to strike out the witness' statement, "They are not considered modern unless they do have it," as not responsive.

Q. What was the rate of speed of this yacht compared with the rate of speed of yachts of that size today?

Objected to as immaterial and irrelevant.

Q. Did the *Kanapaha* have a high rate of speed or a low rate of speed?

Same objections.

A. Considered a low rate of speed at the present time. Her speed was about eleven or twelve knots.

Q. How about consumption of coal?

A. Large for the boat; large for the size of the boat and the rate of speed.

Q. What part of the boat had been renewed since the building of the vessel?

Mr. HUGHES: I object to that as calling for hearsay testimony, as calling for the opinion of the witness, and as incompetent, irrelevant and immaterial.

A. The only thing that had been renewed on the *Kanapaha* was the boilers. The boilers were renewed by Mr. Morton before she was sold to Mr. Moore.

Mr. HUGHES: I move to strike out that testimony on the same grounds.

Q. Do you know by an examination of the *Kanapaha* what was new and what was old on her, from seeing the boat?

144 Mr. HUGHES: Same objection, as calling for an opinion of the witness, and as incompetent, irrelevant and immaterial.

A. From examination of the boat I would state that she hadn't had anything renewed but the boiler.

Mr. HUGHES: I move to strike out that answer on the same grounds.

The WITNESS: She had no new saloons and she had no new engine.

Q. You know these facts by your personal examination of the boat, that she had no new engines and no new saloons?

A. Yes, I know that.

Q. Did she have any new tubes?

A. She had no new tubes, and nothing new about her excepting the boilers.

Mr. HUGHES: I move to strike out the testimony of the witness as to what she had new or old, on the ground that it is an opinion or conclusion without any knowledge on his part.

Q. Now, Captain, were you ever master of the steam yacht *Hermione?*

A. Yes.

Q. Who owned her?

A. She was owned by the Hon. Henry L. Purse, of Boston.

Q. What was her tonnage?

Objected to as immaterial and irrelevant.

A. Her tonnage was 150 tons, about.

Q. She was a larger boat than the *Kanapaha?*

A. Yes.

Q. Was she a newer boat?

Mr. HUGHES: I object to any comparison between this yacht and any other yacht as incompetent and immaterial on the question of value or any other question involved in this case.

A. She was a boat about six years old, model design by Watson, and built in Scotland for the Allen Steamship Co., for the Allen Brothers.

145 Q. She is about six years old now, or was last September?

Same objections.

A. She would be about seven years old now, perhaps eight; this year seven or eight.

Q. Was she sold?

Same objections.

A. Yes.

Q. When—in 1898?

A. She was sold in 1896.

Q. To whom?

A. To Henry L. Purse of Boston. She was sold to the Government last spring.

Q. For what sum?

Mr. HUGHES: Objected to as immaterial, irrelevant and incompetent, also as hearsay, there being no knowledge on the part of the witness shown, and that evidence as well as of other steam yachts is incompetent and immaterial as to the question of value of the steam yacht in controversy.

A. She was sold, I think, for $55,000. The law firm of Russell & Putnam, in State street, Boston, will give you all particulars, if you wish them.

Mr. HUGHES: I move to strike out the answer on the same grounds.

Q. What was the fair value of the yacht *Kanapaha* in the summer of 1898 and at the time of the accident, that is, prior to the accident?

Mr. HUGHES: I desire to object to that as incompetent and irrelevant, the witness not having shown sufficient qualifications to give any evidence as to the value of the yacht; and in support of the objection I should like to ask him a question or two in cross-examination. Do you (to Mr. Bartlett) refuse me permission to
146 cross-examine the witness as to his competency to express the opinion of value?

Mr. BARTLETT: I do now.

Mr. HUGHES: I object to the questions on the grounds stated, and that there is no opportunity offered in a preliminary way to cross-examine the witness as to his competency to give an opinion, and that any opinion of the witness is incompetent and irrelevant to the issue in this case. I wish to add the objection that the question is improper in form, calling for the fair value and not the market value of the yacht.

Q. What was the fair and market value?

Same objection.

A. I would preface my answer by first stating that a yacht has no commercial value. You will understand that——

By Mr. HUGHES:

Q. You mean no market value?
A. No market value.

The WITNESS: The value of the yacht is a fancy value. According to my best belief, I said in my statement in New Orleans that I valued the yacht at $50,000, but if I was put on my oath, and she was at her dock and was put up at auction, that she wouldn't realize $30,000—between $30,000 and $40,000. The reason I stated $50,000 was that I wanted to give what I considered a fair value of the yacht. As I said before, a yacht has no value excepting a fancy valuation.

Mr. HUGHES: I move to strike out the answer of the witness on the ground that it appears that there is no market value of the

yacht, and that his opinion or statement as to the fancy value or other value which he may attach to her is incompetent and irrelevant.

147 Q. Capt. Atkinson, what, in your opinion, would the yacht *Kanapaha* have sold for in September, 1898, or at any time in the summer of 1898 prior to the accident, if offered for sale in New York.

Mr. HUGHES: That I object to as incompetent and irrelevant upon the ground that the witness has shown no qualification to give an opinion as to the value of the yacht or what she would have sold for in New York or elsewhere; and upon the further ground that it now appears there is no market value of the yacht, and any opinion of the witness is a statement too speculative to be received in evidence.

A. My opinion is that she would not realize $30,000.

Mr. HUGHES: I move to strike out the answer on the same grounds.

Q. She would not have realized then $30,000?
A. Not in September, 1898.
Q. Or in the summer of 1898?

Same objections.

A. No.

Motion to strike out upon same grounds.

Q. What was the rate of speed of the *Hermione?*

Objected to as immaterial and irrelevant.

A. Fourteen knots.
Q. Did she have an electric-lighting plant?

Same objections.

A. She had an electric-lighting plant, also electric storage batteries.
Q. And a refrigerating plant?
A. No.
Q. Was she modern in all her improvements?

Same objections.

A. Modern, with the exception of an ice plant. Classed A 1, British Lloyd's, for one hundred years.

148 Q. What was the comparative condition of the *Kanapaha* as compared with the *Hermione?*

Mr. HUGHES: That I object to as incompetent, irrelevant and immaterial, as being no proper evidence of value.

A. In my opinion there wasn't any comparison.
Q. Why not?

Objected to as calling for his opinion; as to his opinion incompetent, immaterial and irrelevant.

A. In the first place one was a boat of eighteen years of age, and the other a boat of six or seven years of age.

Q. That is, the *Kanapaha* being eighteen years of age?

A. Yes.

Q. And the *Hermione* being six or seven years of age?

A. Yes. Do you know the shipping furniture will deteriorate in value according to the age. A vessel of eighteen years of age can't be worth nearly as much money as a vessel of six years of age, supposing everything else to be equal.

Mr. HUGHES: I move to strike out that answer on the ground that it is incompetent and immaterial, and the witness has shown no qualifications to express an opinion on the subject.

Q. In what other points was the *Hermione* superior to the *Kanapaha?*

Same objection as incompetent and immaterial.

A. Age and equipment.

Q. What other steam yachts have you been familiar with—a number of them?

A. I was two years on Mr. Vanderbilt's *Valiant.*

Q. In what capacity?

A. I served as first and second officer of her.

149 Q. In what years?

A. About 1895—1894 or 1895. I was also master of Mr. Hannon's steam yacht *Emily.*

Q. For how long a time?

A. That was for the season, about three or four months. And I have commanded the sloop *Florida* and the sloop *Gulnare* and other sloops; the yacht *Emily,* and the yacht *Hermione,* and the steam yacht *Kanapaha,* and the steam yacht *Eleanor* and others. I hold a master's ocean license; also a first-class harbor license for the harbor of New York, for the State of Connecticut, Rhode Island, Massachusetts, as far east as York river, Maine.

Cross-examination by Mr. HUGHES:

Q. Captain, you say you have navigated in southern waters; for how many years?

A. I have navigated all over the world.

Q. For how long in southern waters?

A. I have been going to sea for 40 years; I have been master of a ship for the last 25 years; I have navigated in all navigable waters of the earth.

Q. You have been through the Bahama channel?

A. Yes.

Q. Frequently?

A. Frequently.

Q. How frequently?

A. I remember passing through the old Bahama channel as far back as 1872; and I traded on the north side of Cuba for several years; and I passed through the old Bahama channel last year several times.

Q. You have been through there several times?

A. Yes; you know that don't make any difference much.

Mr. HUGHES: I move to strike out the last part of the witness' answer, "you know that don't make any difference much," as not responsive.

Q. How long have you been master mariner?

A. I think my first certificate was issued in 1869.

Q. You have been a master ever since?

A. Yes. I was a master before that, but didn't hold a certificate of competency.

150 Q. But since 1869 when you have been at sea it has always been as master?

A. Always.

Q. Have you gone through the Bahama channel en route to Havana at any time?

A. From here to Havana?

Q. From anywhere to Havana?

A. Yes.

Q. Frequently?

A. No, not very frequently; just according to the nature of the voyage. The last time I went through the Bahama channel I had a load of coal from Cardiff for Havana; consequently I had to go through, or I selected that channel. You don't always go through the old Bahama channel to go to Havana.

Q. Do you remember coming to New York about the 2nd of June, 1898?

A. About that time, yes.

Q. You say you received a telegram; have you got that telegram?

A. No.

Q. Or a copy of it?

A. No.

Q. Where did you meet Manning's clerk in New York?

A. On the street.

Q. Where did you go from there?

A. I went to a hotel.

Q. Where were you employed as master of the yacht *Kanapaha?*

A. New York.

Q. What place in New York?

A. On the street.

Q. Did you go to the office of the New York Sun?

A. I did not.

Q. Have you ever been there?

A. I have.

Q. When have you been there?

Objected to as irrelevant and immaterial.

A. Today. I have been there on several occasions. I am acquainted with quite a number of reporters there that I met in Santiago last summer and I often call there to see them.

Q. When did you last call there?

A. This forenoon.

Q. Have you been there frequently before that?

A. Not since my arrival in New York.

Q. When did you arrive in New York?

A. On Monday.

Q. When did you leave the *Eleanor?*

151 A. On the Saturday previous, Saturday week previous to my arrival in New York on Monday.

Q. Where is the *Eleanor?*

A. She was at Nassau when I left.

Q. Did you go to the office of the New York Sun after the loss of the *Kanapaha?*

A. Yes.

Q. How long after?

A. About a month or a month and a half, a month about.

Q. Whom did you see there?

Objected to as irrelevant and immaterial and incompetent and improper.

A. I don't know; I see a number of people there I don't know.

Q. See any one there you did know?

A. I did. I saw Mr. Davis, Mr. Anderson.

Q. What is Mr. Davis' connection with the Sun?

A. He was a reporter on the Sun.

Q. Whom else did you see? Mr. Anderson, a reporter?

A. Mr. Anderson is a reporter.

Q. Who else?

A. That I knew?

Q. Yes, or that you were introduced to?

A. Mr. Chamberlain.

Q. Also a reporter?

A. Also a reporter. Saw two or three others whose names I don't know very well.

Q. Did you see Mr. Chester S. Lord?

A. Don't know him; never was introduced to him; don't know there is such a gentleman.

Q. Who paid your wages while you were on the *Kanapaha?*

Objected to.

A. I don't know.

Q. From whom did you get the money?

Objected to as immaterial and improper.

A. I got a check.

Q. Whose check?

A. Don't know.

152 Q. No recollection as to whose check it was?

A. No.

Q. How many times did you get a check while you were employed on the *Kanapaha?*

Same objection.

A. One check while I was away and another check when I returned for my money.

Q. Where did you get the check when you were aboard the *Kanapaha?*

A. Kingston, Jamaica.

Q. Who handed you the check?

A. The manager of the boat, Mr. Chamberlain.

Q. What do you mean by saying that he was the manager of the boat?

Objected to as immaterial, irrelevant and incompetent.

Q. Do you mean he was in charge of the boat?

A. Yes.

Q. Did you receive instructions from him?

A. Yes.

Q. Is that Mr. W. J. Chamberlain?

A. Yes.

Q. How long was he on the yacht *Kanapaha?*

A. He was on her all the time I was on her.

Q. And manager all that time?

A. Yes.

Q. Gave you instructions all the time you were on her?

A. Yes.

Q. Was this check to your order?

Objected to as incompetent, immaterial, irrelevant and improper.

A. I don't know; I got the money, or at least my friends got the money.

Q. You don't know to whose order it was?

A. It might have been my wife's order.

Q. Do you know who signed it?

Same objection.

153 A. Yes.

Q. Who?

A. Mr. Chamberlain signed it.

Q. Was it Mr. Chamberlain's individual check signed in his name?

A. I don't know.

Q. Did he sign it in your presence?

A. I don't know whether it was his individual check or not.

Q. Did he sign it in your presence?

A. I can't remember. It doesn't matter; I got the check from him and got the money for it; that will be sufficient.

Q. Do you recall whether there was any other name on the check; that is, in the signature of the check, besides Mr. Chamberlain's?

A. I do not. I do not know.

Q. You remember getting money when you came back to New York?

A. I remember getting money, yes.

Q. When you came back to New York?

A. Yes.

Q. After the loss of the *Kanapaha?*

A. Yes.

Q. Where did you get the money?

A. Sun office.

Q. In person?

A. Yes.

Q. Did you get it in cash?

A. Got it in cash, I think.

Q. Or in check?

A. I think I got it in cash.

Q. From whom?

A. From the cashier.

Q. At the Sun office?

A. At the Sun office or downstairs; I know it is in the basement of the Sun newspaper building.

Q. Didn't you have some voucher or order?

A. I had my account.

Q. Did you have your account checked off by anybody?

A. Only by the cashier. The account was handed in to the office.

Q. To whom did you hand the account in the first instance?

A. To Mr. Chamberlain.

Q. Was he there in the Sun office at that time?

A. He was here in New York at that time.

Q. Where did you first hand him the account?

A. I don't know particularly; I forget the circumstances exactly; I don't know where it would be; I think in the Sun office; or I may have sent it from New Orleans by mail.

154 Q. You got the account in the Sun office?

A. It was finally settled there.

Q. You had it when it was settled?

A. I got the money from there.

Q. Didn't you give the account to the cashier?

A. Well, I couldn't give it and have it.

Q. Did you give it to the cashier?

A. Yes; I presume so; I tendered my account and got the money for it.

Q. Who was the cashier?

A. I don't know.

Q. Who else did you see at the Sun office?

A. I saw hundreds of people at the Sun office, nobody that I know.

Q. Did you speak to any one there other than Mr. Chamberlain and the people you have mentioned?

A. Mr. Anderson, Mr. Acton Davis, and several others there that I was acquainted with that were on the staff.

Q. Did you sign a receipt for your money?

A. I don't remember.

Q. Did you sign a receipt for the money that you got from Chamberlain when you were on the boat?

A. I don't remember that.

Q. Did you ever get any money for your services as master of the yacht *Kanapaha* except what you got in the check from Chamberlain and what you received in the Sun office after you returned to New York?

Objected to as incompetent, irrelevant, and immaterial.

A. I never did.

Q. Did you get any money for expenses at any time while you were on the yacht *Kanapaha?*

A. For whose expenses?

Q. For any expenses?

A. The expenses of the yacht, do you mean?

Q. Or for your own expenses?

A. I think I paid the yacht's expenses on one or two occasions, and drew the money from Mr. Chamberlain to pay for coal, water, and grub.

155 Q. How many times did that occur?

A. About once a week, as a rule.

Q. Did you get that money in cash or check?

A. Generally in gold.

Q. You always got the money from Mr. Chamberlain?

A. Always did.

Q. Except for the money that you received from the cashier in the Sun office, did you at any time receive any money while you were on board the yacht *Kanapaha* from any one except Mr. Chamberlain?

Objected to as incompetent and improper and immaterial.

A. Never did.

Q. Did you sign any papers at the time when you became or agreed to become master of the yacht *Kanapaha?*

A. No, sir.

Q. How did you come home after the loss of the yacht *Kanapaha*, or come to New York?

A. I was rescued by the steamer *Albus*, a Norwegian steamer, and remained on board of her for five or six days while she was discharging her cargo at Nuevitas, and then came from there to Key West; we were not allowed to land at Key West, and we went from there to Tortugas, where we were not allowed to land either, and went from there to New Orleans, landed in New Orleans, and came from New Orleans home by rail.

Q. Did you receive any money for your expenses on that journey or any part of them?

A. No.

Q. Was Chamberlain with you?

A. No.

Q. Anybody with you to pay your expenses?

A. No.

Q. Were you given tickets?
A. No.
Q. You paid your expenses yourself?
A. No.
Q. Who did pay them?
A. Where?
Q. From New Orleans to New York.

Objected to as immaterial, incompetent, improper and irrelevant.

156 A. What is the name of that paper there?
Q. Picayune.
A. No, the Times—The Times-Democrat.
Q. The New Orleans Times-Democrat?
A. Yes.
Q. Did you go to the office of that paper to get your ticket?
A. Yes.
Q. Who told you to go there?

Objected to as incompetent, immaterial, improper and irrelevant.

A. I don't remember who told me.
Q. Some one did?
A. I had authority to go there.
Q. From whom did you get authority?
A. Somebody in connection with the Sun newspaper.
Q. Did you get any money from anybody else for your expenses when you were bound for New York?
A. No; I drew my money from the bank in New Orleans.
Q. Your own account?
A. No; through the representation of the Times-Democrat.
Q. What bank was that?
A. Don't remember.
Q. Did they give you a draft on some bank?
A. No, they gave me sufficient money to pay my expenses.
Q. I mean the New Orleans Times-Democrat gave you a draft on the bank.
A. They gave me an order on this bank and introduced me to that bank and satisfied them that everything was correct.
Q. Did you get a letter, any authority, to go to the Times-Democrat?
A. I can't remember; I don't think I got any letter; I think it was a telegram of some kind.
Q. From whom?
A. From the Sun newspaper office.
Q. To whom?
A. To the Times-Democrat.
Q. How did you get word about it?
A. They informed me.
Q. The Times-Democrat?
A. Yes.
Q. Where did they inform you?

A. I think at my hotel.

157 Q. How did they know you were at that hotel?

Objected to as incompetent and immaterial.

A. Because it was reported when I arrived there. My arrival was reported at New Orleans, the same way all those things are known.

Q. Who was on the *Kanapaha* while you were there aside from the crew?

A. All the newspaper fraternity of New York and Chicago.

Q. Name those that you remember.

A. Mr. Chamberlain, Mr. Carroll, Mr. Anderson, Mr. Acton Davis, Mr. Root, Mr. Carleton T. Chapman of the Harper's Magazine, Mr. Marshall of the Journal, and a number of others that belong to the Chicago papers, and a number of others that I never heard the names of and wouldn't know them if I was to meet them on the street today.

Q. What reporters of the Sun were on the yacht?

A. Davis, Anderson, Root, Chamberlain; that is about all I can recall at the present moment.

Q. Were they all on the yacht when you took command?

A. Yes, I think they were all there; they were not always on the yacht; they were coming back and forth; some went to the front with the army, some were with the warships, and they were going back and forth as occasion required.

Q. Making the yacht their headquarters?

A. Yes.

Q. You have mentioned one representative of Harper's Magazine; was there more than one?

A. No.

Q. Was there a representative of Harper's Weekly?

A. This was a representative; he was the special artist for Harper's; might have been the weekly.

Q. Who was that?

A. This Carleton T. Chapman, the man who does all the sketching for Harper's.

Q. Aside from the reporters or artists for the Sun and Harper's Magazine or Harper's Weekly, what reporters were on the yacht while you were there?

A. We had various reporters.

Q. Of what papers?

158 A. We had Marshall, of the Journal, who was wounded the next day after we left; we had another gentleman by the name of Mumford; I think he belongs to the Sun; we had several of the Chicago men, I don't know their names.

Q. Do you remember a man by the name of Spears?

A. No.

Q. How long was Mr. Anderson on the yacht while you were there?

A. Well, he was off and on during all the time, from the time I took command of her until she was lost. He wasn't always with

us; he was sometimes ashore and sometimes with us, but he was not on the yacht at the time of her loss.

Q. Who directed you as to the ports that should be visited or the places to which the yacht should go?

A. Mr. Chamberlain.

Q. Invariably?

A. Yes; my manager.

Q. You remember being at Ponce about the first of September?

A. I think we were, yes.

Q. You were instructed, I think you said, to proceed from Ponce to Havana?

A. Yes.

Q. Who gave you those instructions?

A. I think Mr. Chamberlain.

Q. You called at Cape Haytien?

A. Yes.

Q. How long did you remain there?

A. Over night.

Q. How long was that after you had left Ponce?

A. The second day, I think.

Q. That would bring you to about the 3rd of September?

A. Yes.

Q. And you left Cape Haytien about the 4th of September?

A. I think we left on the afternoon of the 4th. I won't be sure of those dates.

Q. About what time in the afternoon?

A. I think it was about four or five o'clock; I am not certain about that.

Q. And your instructions were then to proceed direct to Havana through the old Bahama channel?

A. Yes.

Q. Do you remember passing Cape Lucretia?

A. Yes.

Q. How long was that after you had left Cape Haytien?

A. Don't remember.

159 Q. Was it the next morning?

A. I don't know, unless I figure up the distance. I can figure up the distance and tell you about what time it was. Tell me how many miles it is from Cape Haytien to Cape Lucretia and I can tell you what time it was when we passed there.

Q. Did you stop at all from Cape Haytien up to the time of the accident?

A. No.

Q. Did you proceed from Cape Haytien up to the time of the accident at a uniform rate of speed?

A. Yes, sir.

Q. And that was about what?

A. About twelve knots.

Q. And was the smooth condition of the sea that you speak of true of all the time after you left Cape Haytien?

A. Don't remember; don't remember that it was.

Q. Had you had any fog between Cape Haytien and the time of the accident?

A. No; we don't have fogs as a rule in the tropics.

Q. Well, you didn't have it?

A. We didn't have it.

Q. Did you have any rough weather?

A. No.

Q. As far as you can recollect, the sea was smooth?

A. The sea was smooth at the time of the accident.

Q. You remember that you left Cape Haytien in the afternoon of the day, before dark?

A. I don't know; I think so, that is all.

Q. That is your best recollection.

A. Yes.

Q. Do you remember passing Gibara?

A. Yes, I remember we passed Gibara.

Q. Remember how far Gibara is from Cape Haytien?

A. No, I don't.

Q. How far is it from Cape Lucretia?

A. I don't know.

Q. How far were you from the land at Cape Lucretia?

A. I have made a mistake in saying Rebecca; I meant Lucretia. Where I have said Rebecca, change it to Lucretia.

Q. Then whenever in your direct examination you have used the word "Rebecca," you should have used the word "Lucretia"?

A. Yes.

160 Q. You remember passing Cape Lucretia early in the morning of the day of the accident?

A. I don't know. I refer you to my report.

Q. I want your best recollection now.

A. I have not made a specialty of remembering those things; I simply wrote them out and handed my report in. My memory I find is defective and often has played tricks on me. I don't place any dependence on my memory at all.

Q. Do you remember passing Cape Lucretia?

A. Yes; I had to pass Cape Lucretia to get from where I was to where I was going; I had to pass there.

Q. Just answer my questions.

A. There is only one question to it; I was going from Ponce, Porto Rico, to Havana; I was going as fast as I could at twelve knots an hour, and the best course I knew to get there. I am not going to state when I passed Cape Lucretia; I can't remember it, and I am not going to state any particular time.

Q. Will you answer this question: Will you state whether or not you passed Cape Lucretia in the morning of the day of the accident?

A. I think I did.

Q. What is your best recollection as to the time when you passed Cape Lucretia in the morning of the day of the accident?

A. Don't remember.

Q. Don't remember at all?

A. Don't remember at all.

Q. Have you any memory as to how far Cape Lucretia is from Nuevitas?

A. No.

Q. Do you remember seeing Cape Lucretia when you passed it?

A. Yes.

Q. How far were you from the land?

A. About six miles.

Q. How far off can you see the land along that coast where you were?

A. Do you mean the land right down at the seashore, or what do you mean?

Q. I mean the nearest land.

A. About five miles.

Q. Or any land?

A. Any land about 35 miles, 40 miles, 50 miles.

Q. What is the character of that coast?

161 A. The character of the coast is low; the character of the land inland is mountainous; you can see the mountains 40 or 50 miles distant, while you couldn't see the lowland five miles.

Q. Was that true all along?

A. That is true.

Q. Is it true from Cape Lucretia to Nuevitas?

A. Yes.

Q. What time did the sun set at about the 5th of September, 1898, in that latitude?

A. Didn't look it up.

Q. Do you remember about the time the sun set on the day of the accident in question?

A. No; I wasn't interested in seeing the sun set that day. I can give you exactly the time the sun set if you will allow me to go out and look it up.

Q. I want your best recollection.

A. I should say the sun set somewhere from six to half past six o'clock. Generally when you are in the tropics where you have twelve hours sun there, it is not far from six o'clock rising and setting.

Q. It was about half past six?

A. Perhaps it was; it may have been a quarter past.

Q. And about how long is the twilight afterwards?

A. There isn't any twilight.

Q. There is some at that point, at the place you were?

A. No.

Q. You mean that it grew dark the instant the sun went down?

A. No.

Q. How long was there a twilight after the sun set?

A. I presume you know what causes the twilight.

Q. I am asking you about how long it was after the setting of the sun when it became dark?

A. It might have been fifteen minutes or ten minutes. You must know that.

Q. I am not talking about what I know; I want to know what you are willing to state.

A. I say five or ten minutes.

Q. You mean that it grew absolutely dark within ten minutes after the sun set?

A. I don't mean that; I mean that it might have been dark within ten minutes after the sun set, or it might have been fifteen minutes.

162 Q. Or it might have been a half an hour?

A. It is a very short time when it gets dark.

Q. Well, what do you mean by dark?

A. Dark enough to light the side lights and masthead lanterns. We always light them at sundown.

Q. Was it as dark within ten minutes after sunset as it was in a half an hour after sunset?

Mr. BARTLETT: Objected to as incompetent, improper, and immaterial.

A. I don't know.

Q. You mean that?

A. I do. There was no moon at the time and I know it gets dark in the tropics very quick after sundown.

Q. Was it as dark within ten minutes after sunset as it was in an hour after sunset?

Same objections.

A. I don't know.

Q. Was it as dark within ten minutes after sunset as it was two hours after sunset on the night in question?

Same objections.

A. I presume it was about as dark; perhaps it might have been a little darker.

Q. When?

A. Two hours afterwards. In all reasonableness, don't you think, with all reasonableness, it would be darker two hours after sundown than it would be ten minutes after?

Q. Why don't you say so?

A. I say it was dark; according to the laws it was dark to have the side lights and masthead lights out.

Q. Captain, if you will answer the questions; what I want to know is whether it was just as dark within ten minutes after sunset as it was two hours later; do you mean to say that it was?

A. No, I don't mean to say anything of the kind; I mean to say that I don't know. I have seen it as dark in the middle of the afternoon as it would be after sunset.

163 Q. I am talking about this particular occasion; I suppose that occasion made some impression on your mind?

A. It did after the ship went ashore, but it was dark then.

Q. What time did the ship run on the reef?

A. I said about half past seven or a quarter to eight.

Q. That statement was true?
A. Whatever statement I made in my report is just as true as I can remember.
Q. That statement you just made?
A. I said in my report that I made when I went ashore.
Q. Then do you remember what time the ship did run aground?
A. You will find that in the report, as near as I can remember. I told the truth in that and I am not going to say anything contradicting that.

Mr. HUGHES: I move to strike out that answer.
The WITNESS: In my report I state when that ship went aground, as near as I can remember. Now, I refer you to that report, because that was then fresh in my memory, and when I made that report I knew the things correct. Now at this distant day I don't remember just when those things occurred. You say this thing happened so and so; I say I am not going to commit myself. I say when I made that report that it was fresh in my mind and that it was to the best of my knowledge. What that says is as near the truth as it can be.

Q. Have you any recollection at the present time at what time the yacht *Kanapaha* went aground or on the reef on the afternoon or evening of September 5, 1898?

Mr. BARTLETT: Objected to as incompetent, irrelevant, improper and immaterial, and as having already been answered, the captain having said that the boat struck at 7.30 or a quarter to eight, and as an attempt to bulldoze the witness.
Mr. HUGHES: I object to that statement of counsel.

Q. Now, I will repeat this question: You say, Captain, that
164 you refer me to your report and that you intend to adhere to what you said in your report. Now, I want to know if you mean by that you have no recollection at present at what hour or about what hour the yacht *Kanapaha* went aground?

Mr. BARTLETT: Objected to as having already been answered three or four times. He is just going over the same ground again.

Q. Will you answer that question?
A. I have answered it.
Q. Will you answer it?
A. I have answered it.
Q. (Question repeated.)
A. I said it went ashore at about 7.30 or quarter to eight, and what I said in my report I believe to be true.
Q. When you say that the yacht went aground about half past seven or quarter to eight, you mean that is your present best recollection, do you?

Mr. BARTLETT: Objected to as incompetent, improper and immaterial and as having already been answered.

A. I don't see whether it makes much difference whether it went

ashore at half past six or half past ten. I don't divvy from my report, and what I state there I stand by.

Q. (Question repeated—read by stenographer.)

A. My best recollection, yes.

Q. Will you state how long it was after sunset, I mean according to your best recollection now, when it was that the yacht went aground?

A. The same thing in a different form—I don't remember.

Q. Will you state how long after it became dark on the evening in question the yacht *Kanapaha* went aground?

A. About an hour and a half or an hour and a quarter; anywhere from an hour to an hour and a half.

Q. You said that these lights at Nuevitas harbor were the only lights along the coast which were not lit that night; is that true?

A. Yes, that is true.

Q. You had noticed other lights?

A. Yes.

165 Q. Where did you notice them?

A. Point Maysi, on the east end of Cuba.

Q. I am referring to this occasion?

A. This night was only just commenced, and there were no lights in that vicinity that night. Because there wasn't any other, how could I see it? You are asking me a question; I say there is no other lights to be seen.

Q. Then on the night in question, you mean to say that you didn't see any lights?

A. No. That is just what it means. Any shore lights; I saw the ship's lights coming up astern. You might put that down and define it.

Q. How far were you from shore during the afternoon of this day?

A. I judge five or six miles, according to the indentations of the coast; six or seven miles.

Q. The land was in sight all the afternoon?

A. The hills were in sight.

Q. The coast was in sight?

A. No, I beg your pardon.

Q. It was at times?

A. I don't think it was at any time; I saw the island, in the interior; I can't say that I saw the coast line.

Q. Do you recollect what course you were steering at the time you run upon this reef?

A. No.

Q. Wasn't it a northwesterly course?

A. Yes.

Q. You are sure of that?

A. Yes, I am sure of that.

Q. Do you remember how far you were from land about sunset?

A. I judge about six miles.

Q. Where were you at sunset?

A. About six miles off the coast of Cuba, according to my report.

Q. What point?

A. Off the coast of Cuba.

Q. What is the last point on the north coast of Cuba that you saw before the sun went down on that day?

A. I can't remember without referring to the chart.

Q. You have no recollection at all?

A. No.

Q. Can you remember any points that you did see during the course of the afternoon on the day in question on the north coast of Cuba?

A. Not now; I couldn't at this date.

Q. Without mentioning just what points by name, you remember that you did see points?

166 A. I remember that I saw the land on the other side of Cuba all day up to sundown.

Q. How far was the reef on which the yacht struck from the land?

A. I have already answered that.

Q. Will you answer it again?

A. Two miles.

Q. That was a reef that run parallel with the coast, didn't it?

A. Yes.

Q. For about how far?

A. About seven miles to eastward off the entrance of Nuevitas where the yacht struck on the outermost point of the reef.

Q. How far did it extend from that point eastward?

A. I didn't look it up. You will find it on the general chart, if you look it up.

Q. Have you looked it up?

A. Yes; but I never measured it.

Q. Can you tell me generally about how far it was?

A. No.

Q. What chart did you look it up on?

A. It is seven miles from where the yacht struck to the entrance of Nuevitas. How far east the reef extends I don't know. I refer you to the chart.

Q. What chart?

A. To the English admiralty chart on the north side of Cuba, through old Bahama channel.

Q. Have you seen it on other charts?

A. Yes.

Q. What other charts?

A. I don't remember, but I have seen it.

Q. Where did you see it on other charts?

Mr. BARTLETT: Objected to as incompetent, irrelevant and immaterial, unless he saw it previous to the accident.

A. I was aboard the yacht *Eleanor* when I saw it last.

Q. You don't remember the name of the chart?

A. I could get you the chart.

Q. Do you understand that the reef ran from the point where the yacht struck eastward?

A. Yes.

Q. You don't know how far from the point where the boat struck to the eastward?

A. It follows the line of the coast, some distance out, eastward.

167 Q. Its whole line is shown on the English admiralty chart?

A. Yes.

Q. You didn't intend to call at Nuevitas?

A. No.

Q. Your instructions were, I think you have testified, to go direct to Havana?

A. Yes, to meet the commission there.

Q. During the afternoon of the day in question did you endeavor to ascertain how far you were from the coast?

A. In what way?

Q. In any way?

A. No; only by my course.

Q. Did you take any means during the afternoon of the day in question in which this accident occurred to determine just how far you were from the coast or to verify your position?

A. Any special means?

Q. Any means.

A. No more means than I had been using—the course, and the distance run, and the distance off shore.

Q. Did you endeavor to ascertain the distance off shore?

A. The distance from Cape Lucretia, the course run, the course steered, and the distance run.

Q. Did you endeavor to ascertain your distance off shore on the afternoon?

A. No.

Q. In no way?

A. Yes, I obtained my distance off shore, as I say, by the distance run, the course steered.

Q. You didn't attempt in any other way to determine your distance off coast?

A. No, because it wouldn't have been any good.

Mr. HUGHES: I move to strike out that answer as irresponsive.

The WITNESS: I couldn't do it without a correct latitude and a correct longitude by observation.

Mr. HUGHES: I move to strike out the last sta-ement of the witness that he couldn't do it without taking a correct latitude and longitude, as irresponsive.

Q. Did you take observations on the day of the accident?

A. I think I did take observations for latitude, yes.

168 Q. And longitude?

A. No.

Q. You got your latitude at noon?

A. At noon.

Q. Well, that afternoon what did you do, if anything, before the accident, to ascertain your position off shore?

A. Steered the course and logged the distance by patent log.

Q. Did you know at the time that the compasses were all right?

A. Yes.

Q. And you knew the speed at which the vessel was going?

A. Yes.

Q. And you knew your exact position at noon when you took your observation?

A. Yes.

Q. And land was in sight all the afternoon?

A. Yes, the hills on the back of the country, 40 or 50 miles distant. The coast line, I don't know; I couldn't see the coast.

Q. What did you do after the accident, that is, where did you yourself go?

A. On board of the *Albus* steamship.

Q. And did you remain on board of the *Albus*, or did you go ashore?

A. Remained on board of the *Albus*.

Q. Did you go ashore at all?

A. Yes.

Q. I mean before you returned to New Orleans?

A. No; I went on shore at Nuevitas to try to get some place to live for the crew.

Q. Did you go and look at the wreck?

A. Went aboard the wreck.

Q. That was the next day?

A. The next day I couldn't get aboard of her.

Q. Why not?

A. Too much sea on.

Q. Was there so much sea that you could see the water breaking over the reef?

A. Yes. I pulled out to her in a boat the next day.

Q. For how long a distance the next day could you see the water breaking over the reef?

A. The whole length of the reef.

Q. You had been calculating in the afternoon how far the vessel had proceeded from time to time, had you not?

A. Yes.

169 Q. And you had been expecting to make Nuevitas light, had you not, or lights at Nuevitas harbor?

A. At dark, yes.

Q. How long had you been expecting to make them, or how long had you been looking for them?

A. Didn't expect to make them until after dark. They don't show very well in the daytime.

Q. You expected to see them at dark, didn't you?

A. Yes.

Q. Then you expected to see these lights at about half past six?

A. As soon as it was dark enough for a light to show.

Q. Was it dark enough for a light to show at half past six?
A. I don't know.
Q. Have you any recollection about that?
A. I have recollection, but I am not certain of my recollection, whether it was dark at half past six or whether it was dark at a quarter past six.
Q. Can you state what recollection you have?
A. Not positively.
Q. Can you state what recollection you have?
A. The recollection I had at the time was that I would see the light as soon as it was lit.
Q. Can you state what recollection you have now as to whether it was dark enough at half past six on the night of the accident to see the Nuevitas light had it been lighted?
A. No.
Q. Do you say it was dark enough at seven o'clock on the night in question to see the light had it been lighted?
A. Yes. I won't say it was dark enough at six; I will say it was dark enough at seven.
Q. And you won't say either way as to half past six?
A. No; it might have been a quarter past six, or twenty minutes past.
Q. But between half past six and seven you would say it would have been dark enough to have seen the light as soon as the light was lit?
A. Yes.
Q. That would have been before seven o'clock?
A. Yes.
170 Q. How long before?
A. You want to get me to say something to contradict what I have said before.
Q. Answer the question.

The COMMISSIONER: If you don't know say so, but answer the question.

A. I have told you repeatedly that I didn't know what time it was the sun set within ten or fifteen minutes. I won't say how long before.
The COMMISSIONER: Just answer the question.
The WITNESS: Well, I don't know, but I will give you my best knowledge on that point, that I run for one hour after dark and didn't make the lights. Now, I don't care what time it was dark or wasn't dark; but I run one hour after the lights should have been lit, but they weren't lit.
Q. That is, you refer to the hour immediately preceding the accident, the running of the yacht upon the reef?
A. Yes.
Q. And you expected to see the lights, as I understand you, an hour before the accident occurred?
A. Yes.

Q. You had been around the north coast of Cuba during the summer of 1898 prior to the night of the accident, had you not?
A. Yes.
Q. You had been to Havana?
A. Yes.
Q. And had been off Santiago?
A. Yes; I had been on the north side, but not off Havana.
Q. Had you been off Nuevitas?
A. Yes, passed Nuevitas.
Q. Had you been off Cape Lucretia and various points?
A. No, not various points.
Q. Cape Maysi?
A. I had passed down through the old Bahama channel, and along the north side of Cuba, and around Cape Maysi, and spent the summer, or two or three months of it, during the campaign there, on the north side.

171 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Thomas Alexander, a commissioner duly appointed by the district court of the United States, for the southern district of New York,

Do hereby certify, that on the 30th day of March, in the year of our Lord one thousand eight hundred and ninety-nine, I was attended by Franklin Bartlett, Esq., proctor for the respondent, and by Messrs. Charles E. Hughes and Archibald Murray, proctors for the libellant, and by the witness, who being of sound mind and lawful age, and the witness being by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition being taken by a stenographer in pursuance of the consent of the proctors for both parties, in the presence of the witness and from his statement, the signing thereof by the witness was waived.

I further certify, that the foregoing deposition was taken by consent of both parties, as per stipulation on first page thereof.

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof, I have hereunto set my hand and seal, this third day of April, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and thirty-third.

THOS. ALEXANDER,
United States Commissioner, Duly Appointed by the District Court of the United States for the Southern District of New York.

172 THOMAS A. ST. JOHNSON, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. You reside in New York?
A. Yes, sir.
Q. What is your occupation?
A. I am clerk in Manning's yacht agency, the office of Thomas Manning.
Q. Were you employed in that office in April and May, 1898?
A. Yes, sir.

By the COURT:

Q. What is Mr. Manning's business?
A. Yacht broker.

By Mr. HUGHES:

Q. Do you recall receiving a check for $5,000 dated April 2d, 1898, to the order of Thomas Manning?
A. Yes, sir.
Q. Signed by "William M. Laffan, p'r L. O. Macdaniel"?
A. I don't remember whom it was signed by; I remember the $5,000 check.
Q. For the yacht *Kanapaha*?
A. Yes, sir.
Q. When was that received?

Objected to the testimony of the check when the witness says he does not know how it was signed.

Mr. HUGHES: I want to prove that when they got the check they deposited it in the bank. We had it in the Sun's office April 2d.

By the COURT:

Q. Do you know when you got it?
A. I don't know the man's name. I am pretty sure the check was signed by the Sun Publishing Company but who was attorney or whatever that was——

Mr. BARTLETT: I object to that sort of evidence, that it was "signed by the Sun Publishing Company."

173 By Mr. HUGHES:

Q. The check for $5,000 which the witness says he knows was received, I want to know when that check was received and when it was deposited in the bank?
A. It was received on April 2d and deposited the same day by myself.
Q. To the credit of Thomas Manning?
A. To the credit of Thomas Manning, yes.
Q. Do you recall a check for $10,000 dated May 14, 1898, which was received for the yacht *Kanapaha*?

A. I recall the check; I don't recall it was dated May 14, but I deposited it on May 16.

Q. To the credit of Thomas Manning?

A. To the credit of Thomas Manning, yes. On May 16 my entry in the check book shows.

The COURT: Do you wish to prove that Chamberlin gave directions up to the time that the yacht was lost, after Anderson left or after Spears left, and that he gave directions in the same way Anderson and Spears gave directions?

Mr. HUGHES: We want to prove he was in control of the yacht and received his directions from the Sun and the money from the Sun to pay them and that he was there at the time of the loss of the yacht. We want to prove all the facts that he knows.

Mr. BARTLETT: We have the deposition of Atkinson and the engineer and the loss is proven.

Mr. MURRAY: We have one or two other witnesses on the question of negligence.

Mr. BARTLETT: I suppose you will admit that the board of trustees or the directors of the Sun never authorized the making of this charter.

Mr. HUGHES: We don't admit anything of the sort.

The COURT: You may take the witness' testimony Monday in the adjoining room. I shall not hear them.

174 Mr. HUGHES: We offer in evidence the papers marked for identification Exhibits 3, 4, 5, 11 and 12.

Mr. BARTLETT: I object to Exhibit 3 for identification as incompetent, improper, irrelevant and immaterial; and on the specific ground that it expired by its very terms within two months of the 1st day of April, 1898.

And the same objection applies to Exhibit 12 for identification.

I also object on the specific ground that the first charter-party was made by Chester S. Lord of the city of New York, and not by the respondent.

I make the same specific objections to No. 3.

I object to Exhibits 4 and 5 for identification as incompetent, improper, irrelevant and immaterial; and on the ground that they were made by Chester S. Lord and not by the respondent.

The COURT: Rulings on those are reserved.

NEW YORK, *April* 17, 1899.

LEONARD O. MACDANIEL, recalled for libellant, testifies:

By Mr. HUGHES:

Q. You have been unable to find any voucher of the payment of $5,000 and $10,000 on April 2d, 1898, and May 14, 1898, respectively, for the *Kanapaha*?

A. I found no vouchers.

Q. Have you produced the stub of the check given for the $10,000 of May 14, which was produced and read in evidence the other day?

A. I have it here.

Q. This is not the same check book which you produce the other day out of which the $5,000 check was taken?

A. No, sir.

175 Q. What is the difference between the two check books?

Objected to, that the witness has said what this is.

A. This is the general check book of the Sun which I have here, which requires two signatures to make the check good.

Q. What two signatures are required to make the check good?

A. The president, secretary, manager or a trustee.

Q. You don't sign checks drawn out of this check book you produced this morning?

A. I do not.

Q. In this check book is the stub of the check of $10,000 May 14, 1898?

A. Yes.

Q. Read it.

A. "No. 23161. May 14, 1898. Thomas Manning"—written out in full—"ten thousand."

Q. That check was the one produced signed by "Thomas Hitchcock, secretary," and "W. M. Laffan, manager"?

A. It was.

Cross-examined by counsel for respondent.

By Mr. BARTLETT:

Q. Those checks are signed by Mr. Hitchcock in advance, are they not?

Objected to unless the witness knows whether this check was signed in advance.

By the COURT:

Q. I understood you to say a moment ago it required to be signed by the president?

A. Any two of the four names I gave.

Q. What else is there on the stub?

A. That is all. No explanation.

Q. The check is made to Manning?

A. Thomas Manning, ten thousand, that is all.

176 By Mr. BARTLETT:

Q. Are those checks signed by the secretary in advance?

Objected to unless the witness knows this particular check was signed by the secretary in advance. The witness stated the other day he had no knowledge of the drawing of that check.

The COURT: He may state what he knows.

Libellant excepts.

A. Occasionally one of the two. Two signatures are never put on the check in advance, but one often is.

By Mr. HUGHES:

Q. Do you know whether any one of the signatures on the check of $10,000, May 14, 1898, the stub of which you have just read, was put on in advance?

A. *I do not know. I was away that day.*

Q. This check for $10,000 is the one you entered and the one to which you refer in your entry in the journal, "chartered to October 1st, *Kanapaha*, $10,000"?

A. Yes, sir.

By Mr. BARTLETT:

Q. What was the loss to the Sun on the Spanish war account?

Objected to as immaterial and irrelevant.

Mr. BARTLETT: They have gone into the "Spanish war account," and your honor allowed it to be read in evidence.

The COURT: I don't think you objected to that, did you? But the object of that was to understand what was the meaning of the phrase "provisional account" and what was done. I understand and understood your defence to consist in the claim that this contract never had the support of the corporation.

Mr. BARTLETT: Yes.

177 The COURT: That this enterprise in chartering the yacht never had the authority of the corporation as a corporation, and that the corporation, as such, is not held by it. Here is a proof that there was going on for a considerable series of times payments and receipts under provisional accounts which were kept in a certain way. As bearing on the question of the effect of that as an admission by the corporation, it seemed to me to be necessary to admit what was the nature of that provisional account.

I exclude this question.

Mr. BARTLETT: We except, on the ground the matter has been already gone into.

Q. What was the total amount received from other newspapers in connection with the yacht *Kanapaha* or for being allowed to go on board that yacht?

Mr. HUGHES: You mean by the Sun?

Q. I mean by the Sun from all these papers?

A. Not over $5,000.

Q. Not over $5,000 in all?

A. No, sir.

Redirect by counsel for libellant.

By Mr. HUGHES:

Q. Turn to the Spanish war account on folio 499 of the ledger of the Sun, the closing entry in that account under date of December 31, 1898, is "editorial expense" closing "$20,731.11," is it not?

A. Yes, sir.

Objected to as incompetent, improper, irrelevant and immaterial; and on the ground that it has already been answered.

Mr. HUGHES: I want to show that was transferred to the "editorial expense," which account—"editorial expense"—was closed, balance was attached to *profits and loss* and the accounts of
178 the Sun finally adjusted when the matter was on the books of the Sun entirely closed.

The COURT: He has already said it was transferred to the "editorial expense." As to the profits and loss that is additional.

Objected to as irrelevant and immaterial and as not within any issue contained in these pleadings, and as having happened subsequently to the month of September, 1898.

By the COURT:

Q. Is the editorial account to which you refer, and to which this last item in the Spanish war account was transferred, a special or general account of the editorial expenses in the work of publishing the Sun?

A. General account; always in existence.

By Mr. HUGHES:

Q. The editorial expense account to which this last item in the Spanish war account was transferred from December 31, 1898, was closed, was it not, on December 31, 1898, and the balance of that account transferred to the profit and loss account of the Sun?

A. Yes.

By the COURT:

Q. Does that differ at all from the balancing of accounts of the close of the year?

A. We close our books four times a year.

Q. When you say the account was closed, is that the sense in which you close your books four times a year?

A. Speaking of the "Spanish war account"?

Q. No, "editorial expense account."

A. It was closed for that quarter.

By Mr. HUGHES:

Q. Finally closed, there was no further adjustment?

A. That quarter's account was closed.

By Mr. BARTLETT:

Q. Just as it is done four times a year?

A. Exactly.

179 By the COURT:

Q. You said the balance was carried to "Profit and loss"?

A. The balance of the "Editorial expense account," yes, sir.

Q. Is, or is not, that always an account which involves a balance to be carried to "Profit and loss"?

A. Inevitably a loss.

Q. It merely represents the expenses of the Sun for that department?
A. Yes.

Recross by counsel for respondent.

By Mr. BARTLETT:

Q. You are recording secretary of the Sun, aren't you?
A. Yes, sir.
Q. Produce the minute book of the meeting of the board of trustees.
A. (The witness does as requested.)

Mr. BARTLETT: Will you admit that the board of trustees or directors of the Sun never authorized the execution of these papers?
Mr. HUGHES: I will not.

Q. You are recording secretary of The Sun Printing and Publishing Association, this respondent?
A. I am.
Q. How long have you been such?
A. Between nine and ten years.
Q. And as such are you present at all the meetings of the board of trustees?
A. I am.
Q. Were you present at all meetings of the board of trustees in the year 1898?
A. I was.
Q. And did you keep the minutes of such meetings?
A. I did.
Q. At any meeting was the execution of any charter-party for the yacht *Kanapaha*, or any agreement of a suretyship in reference thereto such as is found in these Exhibits 3, 4, 5 and 12, authorized by said board of trustees?

Objected to as incompetent, and leading; also that the
180 minutes of the board of trustees during the period in question should be offered in evidence.

By the COURT:

Q. Have you the minutes here?
A. I have.
Q. With that statement, I will allow you to state whether there are any minutes on that subject.

Mr. HUGHES: We except to that as calling for the conclusion of the witness; as incompetent, and as not the best evidence.

A. No.

By Mr. BARTLETT:

Q. Will you produce the minutes?
A. (The witness produces them.)

Mr. BARTLETT: I offer in evidence all the minutes for the year 1898.

The COURT: The witness says there is nothing in the minutes on this subject. Counsel can examine them and if he finds anything in particular he can put it in evidence.

Mr. HUGHES: I haven't the slightest objection to these minutes going in evidence.

The COURT: You can put them in if you wish, if there is anything pertinent.

Mr. BARTLETT: I offer in evidence the minutes of April 26, 1898, on this point; to show that at that meeting application was received from the Third Avenue Railway Company for permission to change their motive power, and on motion of Mr. Hitchcock it was resolved "That said application be hereby granted, and that the president be authorized to sign the same and to affix the corporate seal of the association to said instrument." That is to show what the practice was in signing such instruments.

Mr. HUGHES: I object to the introduction of the minutes
181 in question unless all the minutes of the board of trustees of the Sun during the period are submitted in evidence, and to that we have no objection whatever, in fact we desire to have them go in.

The COURT: Under objection I will not admit the minutes in that way. I allow you to prove what is the practice of the corporation in regard to authority.

Q. What is the practice of the corporation of signing written instruments in behalf of the corporation?

Objected to as incompetent, irrelevant and improper, that the practice of the corporation with regard to the signing of written instruments in general is not binding upon this libellant in reference to the authority of Mr. Lord to execute the instruments in question on behalf of the Sun.

The COURT: I don't admit it because I think it conclusive, but I must admit it as part of the evidence.

Mr. HUGHES: I object further, on the ground that the witness not being a trustee of the Sun, but the cashier and recording secretary of the Sun, is not shown to be qualified to speak as to the practice of the Sun in the execution of written instruments or in the making of contracts; it does not appear that he has charge of the business of the Sun in which such contracts are made.

The COURT: He has been for nine or ten years recording secretary; I think that is *prima facie*.

Mr. HUGHES: We except.

A. A resolution is passed authorizing the president or other proper officer to sign and the secretary to affix *to* official seal to the instrument.

Mr. HUGHES: I move to strike that out as incompetent, irrelevant and not binding on the libellant.

Motion denied. Libellant excepts.

182 Q. Is it true that on April 26 an application was received from the Third Avenue Railway Company for permission to change their motive power, that is by the board of trustees of the Sun Printing and Publishing Association?

The COURT: I consider that not admissible under objection. The books are here for examination and it can be contested if the other side wish to dispute it.

Mr. HUGHES: My objection is simply on the ground that all these minutes should be admitted.

The COURT: I sustain your objection so far as I have stated. I think on the question whether a certain contract has been made or not the practice of the corporation may be used as far as is customary.

Q. Such has been the usage of the corporation since you have been recording secretary of the corporation, has it not?

Objected to as leading, incompetent, and on the same special grounds as already stated.

Q. That is, such has been the usage and the practice, as you have just described it in your former answer, of the respondent corporation since you have been its recording secretary?

Objected to as leading and incompetent, and on the special grounds already stated.

The COURT: I sustain it as leading. I allow it in substance.

Q. What has been the usage and practice of the respondent corporation in reference to the execution——

The COURT: Ask to what extent that has been the practice and for how long.

Q. To what extent and how long has that been the practice?

Objected to on the same grounds. Objection overruled. Libellant excepts.

183 A. During the time I have been recording secretary.

By the COURT:

Q. That is for nine or ten years?

A. Yes, sir.

By Mr. BARTLETT:

Q. Will you produce the by-laws of the association in force during the months of April and May, 1898?

A. (The witness does as requested.) I have them pasted in here (producing a book) as modified.

Q. Who were the trustees in the months of April and May, 1898?

A. Paul Dana, Thomas Hitchcock, William M. Laffan, Edward P. Mitchell—no, we had no fifth trustee at that time.

Q. Who were the four trustees?

A. Franklin Bartlett.

Q. Mr. Mitchell wasn't made trustee till when?

A. Until the annual meeting in the month of May, 1898; about May 26.

Q. May 23, 1898?

A. May 23, 1898.

By the COURT:

Q. The president was who?

A. Paul Dana.

By Mr. BARTLETT:

Q. And the secretary?

A. Thomas Hitchcock.

By the COURT:

Q. You as recording secretary were always present at the meetings of the board?

A. Yes, sir, as secretary of the board.

Mr. BARTLETT: I offer in evidence the by-laws.

They are marked Respondent's Exhibit A.

Mr. HUGHES: I desire to reserve my objection on the ground that they are not binding on the libellant. As incompetent against the libellant.

Objection overruled. Libellant excepts.

Mr. BARTLETT: There were several other instances in the minutes where the execution of specific papers was authorized during
184 the period but your honor holds all of these are inadmissible.

The COURT: On your part, yes.

Mr. BARTLETT: Then I will not offer them in evidence.

Redirect by counsel for libellant.

By Mr. HUGHES:

Q. Does this book which you have produced contain all the minutes of the board of trustees of the respondent?

A. Do you mean from the organization of the company?

Q. I mean from the first of January, 1898, on?

A. It does.

Q. I find here a meeting on January 25, 1898, and another on February 22d, 1898, and another on March 22d, 1898. Were the meetings of the board of trustees held once a month?

A. They were.

Q. And the next meeting is April 26, 1898, and the next May 24, 1898. Am I correct?

A. Yes, sir.

Q. And the next June 28, 1898?

A. Yes, sir.

Q. The only meeting held in April was that of April 28, was it not?

A. In 1897? Yes, sir.

Q. The only meeting held in April, 1898, was April 26, 1898?

A. On April 26, yes.

Q. I note there a minute that the examining committee reported the books correct to the 23d instant. Who constituted the examining committee?

A. I may be in error, but my recollection says Thomas Hitchcock and Franklin Bartlett.

Q. And the books that are referred to are the books of account of the Sun, are they not?

A. They are.

Q. On May 24, 1898, I notice a minute of a meeting; that was the only meeting held in May that year, was it not?

A. The only board meeting.

Q. That is of the board of trustees?

A. Yes, sir.

Q. I call your attention to the meeting of November 22, 1898, and to the following minute, "Report was received from the auditor that the books were correct to November 1st, 1898."

A. Yes.

185 Q. Who was the auditor?

A. Mr. Wallace.

Q. Appointed by the board?

A. The manager was authorized to engage an auditor at some meeting of the board.

Q. That is Mr. William Laffan?

A. Yes.

Q. And it was customary to have the auditor examine the books and to report the result of his examination to the board?

A. It is.

Q. And such report was made at this meeting of November 22, 1898?

A. As recorded.

Q. And the books referred to are the books of account of the Sun?

A. Yes, sir.

Q. As matter of fact, was there any exception taken to that report?

A. They never take exception to a correct report.

Q. Then the report was correct?

A. The auditor said so.

Q. And so accepted by the board of trustees?

A. Yes.

Q. I call your attention to the meeting of October 29, 1898, in these words, "Written report was received from the auditor that he had examined the books from the date of the last examination by the examining committee to the 20th of October, 1898, and found the same correct and payments properly vouched for." Was that report received?

A. Yes, sir.

Q. Was it accepted as a correct report by the board of trustees?

A. Yes, sir.

Q. When was the last examination of the books referred to in that minute?

A. As a matter of recollection I think the previous March.

Q. March, 1898?
A. Yes, sir.
Q. So that this report covered period from March to October 20, 1898?
A. If my first date is right; yes, sir.
Q. Taking the minutes of January, 1898, was an execution of any written instrument brought before the meeting of January, 1898?
A. Not according to the minutes.
Q. Was there in fact that you can recall?
A. I don't recollect now.
186 Q. The next meeting was February 22d, 1898, was it not?
A. Yes, sir.
Q. Was there an execution of any written instrument brought before that meeting?
A. There was.
Q. Do you refer to the execution of a new certificate of stock?
A. I do.
Q. Not to the execution of any written contract?
A. That is all.
Q. A certificate of stock; that is all?
A. Yes, sir.
Q. Nothing else?
A. No, sir.
Q. The next meeting was March 22d, 1898?
A. It was.
Q. Was the execution of any written instrument or contract brought before that meeting?
A. No, sir.
Q. So down to and including April 26th, 1898, the only written instrument which was brought before a meeting of the board of trustees of the Sun from January 1st, 1898, besides this certificate of stock, was the application from the Third Avenue railroad to change its motive power?
A. Yes, sir.

The COURT: When was that?
Mr. HUGHES: April 26, 1898.
Mr. BARTLETT: I object to that unless the minutes are in.

By the COURT:

Q. Was that the next meeting after March 22d?
A. Yes, sir.
Q. At that meeting there was an application from the Third Avenue Railroad Company?
A. Yes, sir.

Mr. BARTLETT: Let us have it in.
Mr. HUGHES: All that is important is in the question.

Q. There was such an application at that meeting by the Third Avenue railroad, was there?
A. There was.

Q. What was done in regard to that?

Mr. BARTLETT: Why not read the whole thing?

187 A. "Application was received from the Third Avenue Railroad Company for permission to change their motive power and on motion of Mr. Hitchcock it was resolved, that said application be hereby granted and that the president be authorized to sign the same and to affix the corporate seal of the association to said instrument."

By Mr. HUGHES:

Q. The next meeting was May 24, 1898?

A. Yes, sir.

Q. Was the execution of any written contract authorized at that meeting? There was a power of attorney appointing Charles R. Parsons to collect moneys due from the city of New York?

A. That is true.

Q. And that is all?

A. There was an authority given verbally.

Q. I am speaking about written contracts. That is all.

A. Yes, sir.

Q. Read it about the power?

A. "On motion the president was authorized to appoint Charles R. Parsons to collect all moneys due or to become due from the city of New York to the Sun or Evening Sun and to affix the corporate seal of this association to the certificate of appointment."

Q. The next meeting was June 28, 1898?

A. Yes, sir.

Q. Was the execution of any written contract authorized at that meeting?

A. No, sir.

The COURT: At what meetings during the year were there any such?

Q. There were none at the meeting of July 6, 1898, the next meeting?

A. No, sir.

Q. None at the meeting of August 23, 1898?

A. No, sir.

Q. Was there one at the meeting of September 27, 1898?

A. No, sir.

Q. Or October 25, 1898?

A. No, sir.

Q. Or November 22d, 1898?

A. No, sir.

188 Q. Or December 27th, 1898?

A. No, sir.

Q. The meeting of December 27th, 1898, there is a minute that Mr. Laffan reported that he had received a certificate from the auditor of the correctness of the books to the 1st of December?

A. Yes.

Q. That report was received and accepted by the board of trustees?

Objected to, that the minutes show what was done.
The COURT: He can read it.

Q. As matter of fact it was the practice of the board of trustees to have frequent reports of examining committees or all committees as to the correctness of the books of account of the Sun, was it not?

A. It is the custom to offer a report at every monthly meeting of the board of trustees.

Q. As to the accuracy of the books of account?
A. Yes, sir.
Q. The by-laws were amended in June 28, 1898, were they not?
A. Yes, sir.

Mr. HUGHES: I offer in evidence the amended by-laws as amended at the time.

They are marked Libellant's Exhibit No. 13, April 17, 1899.

Q. I have called your attention to every written contract the execution of which was brought before the board of trustees of the Sun in 1898, have I, as shown by the minutes?
A. Yes.
Q. During all this time the Sun was doing business?
A. Yes.
Q. Didn't it charter several boats during the Spanish war?
A. No, sir.
Q. Some. What about this *Premier*, do you know anything about that?
A. I paid bills for it.
Q. Any other boat that you paid bills for?
A. Yes.
Q. What other boat?
A. One called the *Carbonaro*.
189 Q. What other boat?
A. That is all I recollect.
Q. Did the payments made for those boats enter into this Spanish war account?
A. Yes, sir.
Q. And the expenses ultimately went to the editorial expense account in the same manner as the yacht *Kanapaha*?
A. In part, yes, sir.
Q. Did the Sun have occasion to take out insurance during the year 1898 on these other vessels?

Objected to as immaterial here.
The COURT: I allow the question.

A. Yes, one that I recollect.
Q. Which one was that?
A. On the *Carbonaro*.

Q. The expenses for premiums went into this same account I suppose?

Objected to as irrelevant and immaterial.
Same ruling. Respondent excepts.

A. Yes.

By the COURT:

Q. Do you mean the "Editorial expense account" or "Spanish war account"?
A. First the "Spanish war account."

By Mr. HUGHES:

Q. Then the "Editorial expense"?
A. In balancing, yes sir.
Q. In the same manner as the expenses of the yacht *Kanapaha*?
A. Yes, sir.
Q. I suppose during the year 1898 reporters were employed from time to time by the Sun?

Objected to as incompetent, irrelevant and immaterial, and as already in evidence.

Q. Under written contracts I mean of course?
A. Not to my knowledge.
190 Q. Do you know what goes on in the editorial department?
A. Only by hearsay.
Q. And only such matters as happen to come to your department in the cashier's office?
A. Yes, sir.

By the COURT:

Q. Did you state whether there was an executive committee or anything corresponding to that sort of body in the Sun? Mr. Laffan is manager, does that mean of the whole concern or only of certain interests?
A. That means manager of the whole concern.

By Mr. BARTLETT:

Q. There was an executive committee at one time?
A. There was, but I don't think in 1898 it was in existence. That is a matter of record however.
Q. When did the auditing committee go out? That was the executive committee?
A. There were two committees, examining committee and executive committee. My recollection is that the examining committee was a subcommittee of the executive.
Q. When was an auditor substituted for the examining committee?
A. At the close of the fiscal year of 1897, that is to say in April, 1898, that was the close of the fiscal year.

By the COURT:

Q. Was Mr. Laffan elected manager?

A. He was elected by ballot.

Q. Each year?

A. To the best of my recollection. I may be mistaken about that.

Q. Do these records show that?

A. These records show whatever it is. I may be mistaken about that. Refer to the annual meeting.

Q. When was the annual meeting?

A. You would have to look in May, 1897, for that. I think I am mistaken. The president is voted for by ballot by the board of trustees.

191 By Mr. HUGHES:

Q. How is the manager appointed?

A. My recollection is that he was appointed several years ago the office to hold until the appointment was taken back.

Q. He was in fact general manager of the whole business of the Sun during 1898?

A. He was the manager. When you say "whole business" it covers too much ground.

Q. He managed the financial operation?

A. Particularly the financial or business part of the office.

Mr. BARTLETT: "Mr. Hitchcock was appointed to investigate and report on the subject of surplus earnings." That is April 26, 1898.

Recross by counsel for respondent.

By Mr. BARTLETT:

Q. Isn't it the fact that at the meetings of the Sun when the examining committee was in office that Mr. Hitchcock simply reported that the books had been examined and found correct and that nothing further was said then?

A. At the meeting of the Sun, it was, yes.

Q. Isn't it the fact that the same was true as to the auditor—that is, that Mr. Laffan reported?

A. Yes, he was the mouth-piece.

Q. Was any report ever made by the auditor in reference to the yacht *Kanapaha* or to the alleged charter-parties or agreements of suretyship in reference to the yacht *Kanapaha?*

Objected to as leading and calling for a conclusion; that the question should be what the auditor did report, then whether that included items relating to the *Kanapaha* would be a matter of inference for the court.

Q. What did the auditor report as to disbursements and receipts?

A. As to the correctness of the books as to disbursements and receipts.

192 Q. And that is all?

A. That is all.

Q. His inquiry did not go beyond that, did it?
A. It did not.
Q. Did he ever make any report in reference to the yacht *Kanapaha?*

Objected to as calling for a conclusion as to the effect and contents and purport of the auditor's report. Instead of asking what the report was and leaving the conclusion to be derived from the statement.

By the COURT:

Q. Do you know what he did?
A. I know what he does. He reports in writing to the manager that he has examined the receipts and expenditures and finds the latter properly vouched for and that the books are correct.

By Mr. BARTLETT:

Q. And that is all he did?
A. And that is all he did.

Redirect by counsel for libellant.

By Mr. HUGHES:

Q. I notice in the minute of February 28, 1899, Mr. Laffan reported that he had received certificate from the auditor that the books were correct up to the 25th instant.
A. Yes.
Q. And also March 28, 1899, that Mr. Laffan reported that he had received certificate from the auditor that the books were correct to the 25th instant—that is, March 25, 1899.
A. Yes, sir.
Q. On that report a dividend was declared, was it not?

Objected to as immaterial and irrelevant whether the dividends were paid in March of this year or not.

Q. I want to show that you acted on that report.
A. No, sir, we did not.
193 Q. Read the resolution that was passed.

Objected to. Objection sustained. Libellant excepts.

Q. As matter of fact the report that the books were correct March 25th, 1899, was accepted, was it not?
A. Yes, sir.
Q. And the report made was the usual report showing the receipts and expenditures?
A. The report was the usual report saying the receipts and expenditures were correctly entered in the books of account.
Q. Down to that time?
A. Yes, sir.
Q. Whose handwriting is this on Exhibits 3, 4, and 5 in pencil?
A. I don't know.
Q. Did you ever see it before?
A. No, sir.

SIDNEY CHUBB, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. What is your business?
A. At present marine underwriter, member of the firm of Chubb & Son, 5 and 7 South William street, city.
Q. You are a marine underwriter in this city?
A. Yes, sir.
Q. And you were such in the year 1898?
A. Yes.
Q. And in 1898 you effected the insurance on the yacht *Kanapaha*?
A. Our firm did.
Q. Have you the policies of insurance here?
A. I have some 20 original policies covering both the physical and war risks on the *Kanapaha* for two periods of two months each. From April 2d, 1898, to June 2d, 1898, first period.
Second period from June 2d, 1898, to August 2d, 1898, each in the sum of twelve thousand pounds sterling.
In addition we have received some five other policies cov-
194 ering extension of the last period of one month, namely, from August 2d to September 2d, 1898.

By Mr. BARTLETT:

Q. Why are you reading?
A. Because I can't carry figures in my head. These last five policies are not in our office, we receive them, but we don't find them.

By the COURT:

Q. Did all the policies of which you have any knowledge expire on the 2d of September?
A. The 2d of September, I know that, yes, at noon New York time.

By Mr. HUGHES:

Q. These are the policies that you now produce?
A. Yes. I think there are twenty of them if I didn't make a mistake in counting them. They are divided into physical hazard and war hazard or risk.
The COURT: How do they run?
The WITNESS: Account of C. T. Bowring & Co.
Q. Who are they?
A. A large firm of insurance brokers, and I think ship agents on the other side in London, England.
Q. With whom you correspond?
A. With whom we correspond very largely.

By the COURT:

Q. Are the insured stated to be Bowring?
A. It would always be in English practice.

Q. In this case in all these policies are C. T. Bowring named as the insured?

A. I haven't looked at them, but I have no doubt it is so. "C. T. Bowring & Co., or—as agent." They are all in substance in the same form.

Q. Read it.

A. "C. T. Bowring & Co., or—as agents as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part, or in whole, doth make insurance and cause themselves, and
195 they and every of them, to be insured, lost or not lost, at and from"—that is the end of the printed form.

Q. And that is the form in all?

A. If it is not in the same words it is substantially the same in all. I think it is the same words.

By Mr. HUGHES:

Q. Have you produced the correspondence you have relative to the effecting of this insurance?

A. With whom?

Q. With any person.

A. I have here all our letters to Bowrings.

Q. Have you here the instructions which you received for such insurance, or your firm, from the New York Sun?

A. They were all oral as far as I know. I find we have but one letter on the file, which has no reference to the taking of the insurance, that is after the insurance was effected. I think it has to do with premiums.

Q. Is this the only letter that you have from the Sun?

A. This is the only one I find or found any trace of. It is dated July 12, 1898.

Q. And you received this letter on or about that date?

A. Yes, sir, I think the same date.

Q. And it relates to this insurance upon the yacht *Kanapaha*?

A. To some of these policies produced.

Mr. HUGHES: We offer the letter in evidence.

Objected to as irrelevant, immaterial and incompetent and improper; and that respondents cannot be bound by letters by the cashier unless it is within the scope of his power.

The COURT: I admit it.

Respondent excepts.

It is marked Libellant's Exhibit No. 14, April 17, 1899.

Q. Have you produced your letter-press book of letters written by your firm to the Sun Printing and Publishing Association relative to the insurance on the yacht *Kanapaha*?

A. I now produce it.

196 Q. Under what date?

A. The first one is April 7, 1898.

Q. Was the original of that letter sent to the Sun?

A. I have no doubt it was.

Objected to.

Q. Is the signature of that letter the signature of your firm?
A. It is.

Q. You have no doubt, have you, that that letter was sent to the Sun?

A. It ought to have been sent and I assume that it was sent.

Mr. HUGHES: I offer the letter in evidence.

Objected to as incompetent, irrelevant, improper and immaterial; and on the specific ground that it should be shown to have been sent; and as not the best evidence; that is a copy.

Mr. HUGHES: I give notice to the other side to produce the original of the letter dated April 7, 1898, addressed to the Sun Printing and Publishing Company of New York city, by Chubb & Son.

Mr. BARTLETT: The fact is that that boat was insured by those gentlemen, not in the name of the Sun, but by some insurance gentlemen.

Mr. HUGHES: The objection that I have not the original of the letter here fails if I give notice that I want the original produced.

The letter-press letter is marked for identification Libellant's Exhibit No. 15.

By the COURT:

Q. Do you know who had the personal interviews with any person in behalf of the insurance of the vessel?
A. Certainly I do.
Q. Who did?
A. My brother, the head of the firm. I had nothing to do with it except I may have heard part of it. I know where such were because I overheard part of it, but I took no part in it.
Q. Do you know what person in behalf of the insured was making negotiations?
A. No, sir, I do not.

197 By Mr. HUGHES:

Q. Have you other letters written by Chubb & Son to the Sun?
A. I have copies of them, I think one or two or three more, in the letter-press copies.
Q. Under what dates?
A. Under date June 3, 1898.

The COURT: Mr. Chubb cannot testify, and he has nothing here to put anything in evidence, and I am not going to mark any more things for identification. I stop right here. I don't take any more time for anything that you have not the evidence here to supplement. When you get the evidence you can use these things just as well.

Mr. CHUBB: Some of these twenty policies relate only to the physical hazards and the others exclusively to the war risk, but the description of the assured is substantially the same in all. The fol-

lowing is a fair sample of all. I think in legal effect they are *the* exactly the same:

"Whereas it hath been proposed to the Tokio Marine Insurance Company, Limited, by C. T. Bowring & Co., as well within own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may or shall appertain in part or in all, to make with the said company the insurance hereinafter mentioned and described, now this policy witnesseth that in consideration of the said person or persons effecting this policy promising to pay to the said company a premium at and after the rate of 25 shillings per cent. for such insurance, the said company takes upon itself the burden of such insurance to the amount of six hundred pounds, and promises and agrees with the assured, their executors, administrators and assigns in all respects truly to perform and fulfil the contract contained in this policy."

By Mr. HUGHES:

198 Q. These policies that you have produced are covered by the bills for premiums which have been marked here Exhibits 8, 9 and 10?

Objected to as leading and as suggesting the answer to the witness and therefore improper. Objection overruled. Respondent excepts.

A. Yes, they covered five months.

By the COURT:

Q. Can you state whether the premiums in these policies are the premiums covered by those?

A. They are. The two original periods of two months each and the one extension of one month, these are the bills for them.

HENRY G. PAINE, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. What is your business?

A. Managing editor of Harper's Weekly.

Q. Do you know Mr. Kellogg of the Sun?

A. I do.

Q. What is Mr. Kellogg's employment on the Sun?

A. I don't know that I can give information on that.

Q. Do you remember arranging for two reporters to go on the yacht *Kanapaha* in the year 1898?

A. I remember going to the Sun office to make such arrangement.

Q. When was that?

A. I can't give you the exact date of that.

Q. About what time?

A. I looked that up a day or two ago and the dates have slipped my mind, but it was two days before the yacht sailed.

Q. Did you go to the Sun office personally?
A. I did.
Q. Whom did you see there?
A. I saw Mr. Chester Lord.
199 Q. Had any one referred you to Mr. Chester Lord?
A. I can't recollect.
Q. Hadn't Mr. Kellogg?

Objected to, the counsel suggesting answers to the witness.

Q. Mr. Kellogg is connected with the Sun?

By the COURT:

Q. Do you know how you came to see Mr. Lord?
A. I do, yes, sir; because I heard that they were going to send the yacht, or a yacht.

Mr. BARTLETT: I move to strike that out.

By Mr. HUGHES:

Q. Did you see Mr. Lord?
A. I did.
Q. State what was said and done between you and Mr. Lord at that time.

Objected to as improper, irrelevant and immaterial, and as not binding on the respondent.
The COURT: I shall have to take the conversation.
Respondent excepts.

A. I asked Mr. Lord if he was going to send a yacht, that I had so heard, and he said that was the case; and then I asked permission to send a——

Mr. BARTLETT: I want to make the further objection: What difference does it make? It is in evidence already that Lord signed the charter-parties.

The WITNESS: And I asked permission to send an artist on the yacht to act as artist and correspondent for Harper's Weekly.

By the COURT:

Q. Was that all the conversation?
A. Mr. Lord said that would be all right, that our man could go.

By Mr. HUGHES:

200 Q. Was anything said about arranging for the price or compensation?

Objected to as improper, irrelevant and incompetent and as suggesting the answer.

A. No arrangement was made as to price.
Q. Was anything said as to with whom the arrangement as to price should be made, in that conversation?

Objected to. Objection overruled. Respondent excepts.

A. There was.
Q. State what it was, please?

The same objection, ruling and exception.

A. I started, I brought up the subject of terms and Mr. Lord said, as near as I can recollect, "Mr. J. Henry Harper and Mr. Laffan are very good friends, aren't they?" I said I believed they were. Mr. Lord said, "Well, it is all right to let the man go on the boat but as to terms, wouldn't it be well to leave the matter for them to settle between themselves; any arrangement that they make will be satisfactory to you and of course it will be satisfactory to us."

Q. That is to Mr. Laffan and Mr. Harper?
A. It would be satisfactory, he said, "to you and to us;" I don't know whom he meant.
Q. He meant to leave it to Mr. Laffan and Mr. Harper to arrange about the price?
A. Yes, sir.
Mr. BARTLETT: How can he say?
Q. That is what was said, wasn't it? I mean, in testifying you would leave it to them to make the arrangement. What did you mean by "them"?

Objected to as to what the witness meant. That the language speaks for itself.
Objection sustained. Libellant excepts.

201 Q. Did men from Harper's Weekly go on the boat *Kanapaha?*

The COURT: I exclude that.

By Mr. BARTLETT:

Q. Don't you know as matter of fact at that time that Mr. William Laffan was in Europe?
A. He was in Europe.

By Mr. HUGHES:

Q. I understand that what Mr. Lord said was that at some subsequent time the compensation could be arranged for by Mr. Laffan; wasn't that it?

Mr. BARTLETT: I ask that the testimony be read.
The stenographer here reads the testimony of witnesses as follows:
"Well, it is all right to let the man go on the boat, but as to terms wouldn't it be well to leave the matter for them to settle between themselves? Any arrangement that they make will be satisfactory to you and of course it will be satisfactory to us."
Question withdrawn.

J. HENRY HARPER, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. You are publisher of Harper's Weekly and a member of the firm of Harper & Brothers?

A. Yes.

Q. You have heard the testimony of Mr. Paine in regard to his conversation with Mr. Lord as to having a representative of Harper's Weekly on the yacht *Kanapaha*, you were in court just now and heard that testimony?

A. Yes.

202 Q. Did you subsequently see or have any correspondence with Mr. Laffan of the New York Sun regarding the compensation to be paid?

A. I did.

Q. Was the communication you had with Mr. Laffan oral or written?

A. It was partly written and partly oral.

Q. Did you receive a bill from the Sun for such compensation?

A. I did.

Q. Subsequent to that did you have an interview with Mr. Laffan?

A. No.

Q. You simply had correspondence with him?

A. I had correspondence, yes.

Q. Have you the letters that you received from Mr. Laffan here?

A. I wrote to Mr. Laffan and he simply sent a bill. He sent a bill to the office for our use of the yacht, and then I wrote.

Q. That is, from the Sun?

A. Yes. I don't know whether that came from Mr. Laffan personally; it came from the Sun office. And I wrote to Mr. Laffan in view of the arrangement that was suggested—I being away at the time and so was Mr. Laffan; he was in Europe—and he said it would be all right. That was all that passed between Mr. Laffan and myself.

Q. You have letters from Mr. Laffan here, have you not, relating to the matter?

A. I have not.

Q. Haven't you produced letters here?

A. I never received any.

Q. From the Sun; didn't you receive any letter from the Sun or from Mr. Laffan?

A. Not to my knowledge.

Q. Or didn't you receive any letter from any person regarding what should be paid for these privileges?

A. Not to my knowledge.

Q. Haven't you any correspondence at all in court relative to the matter?

A. I have a purely personal letter.

Q. From Mr. Laffan?

A. From myself to Mr. Laffan. I don't think it ought to be produced, but Mr. Murray told me I must have it here.

203 Mr. BARTLETT: I submit it to his honor if there is any doubt about it.

Q. Have you got any letter from Mr. Laffan?
A. None whatever.
Q. Did you have an interview with Mr. Laffan after the writing of the letter to which you refer?
A. No, he simply called me up on the telephone and said it was all right.
Q. What was all right?
A. I said I wrote to him.
Q. About the compensation to be paid?
A. I wrote to him a personal letter in reference to the payment.
Q. For the men on the *Kanapaha?*
A. I don't think anything was said about men; I didn't know we had men.
Q. For the privileges that were given to Harper's Weekly in connection with the yacht?
A. Of course it was based on that.
Q. And was that adjusted between you and Mr. Laffan?
A. It was.

THOMAS HITCHCOCK, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. BARTLETT:

Q. You reside in this city, No. 8 East 29th street?
A. Yes, sir.
Q. Were you in the year 1898 one of the trustees of the respondent, The Sun Printing and Publishing Association?
A. I was.
Q. An officer of said association?
A. I was.
Q. What officer?
A. Secretary.
Q. In the months of April and May, 1898, you were such secretary, that is, of the Sun Printing and Publishing Association?
A. I was.
Q. Did you at any time execute any charter-party or agreement of suretyship in reference to the yacht *Kanapaha?*
A. I did not.

204 Mr. HUGHES: I object, on the ground that it is irrelevant and immaterial. That there is no suit here on a charter-party executed by Mr. Hitchcock and no pretence that there was any.

Objection overruled. Libellant excepts.

Q. What was the usage and practice of the Sun Printing and Publishing Association about the execution of instruments?

Objected to as incompetent and irrelevant and not in any way binding upon the libellant.

Objection overruled. Libellant excepts.

Q. I mean as to their authorization by the board of trustees and affixing the corporate seal. Were such matters brought up before the board of trustees?

Objected to further on the specific ground that any instructions or communications, whether matters of practice or otherwise, between the board of trustees and particular individuals are not competent as against this libellant.

Objection overruled. Libellant excepts.

A. The secretary was, in case of any instrument being directed or approved, to affix the seal on behalf of the corporation by a vote by resolution.

Q. By a vote of the board of trustees?

A. Yes, sir.

Q. Do you remember a certain alleged charter-party for the yacht *Kanapaha* being brought to you in the month of April, 1898?

A. I do.

Q. Who brought it to you?

A. Mr. Lord.

Q. Mr. Chester S. Lord?

A. Mr. Chester S. Lord.

Q. What did he ask you to do?

Objected to as immaterial and irrelevant. That any transaction between Mr. Lord and Mr. Hitchcock is not binding on the libellant.

Objection overruled. Libellant excepts.

A. He asked me to execute on behalf of the Sun Association, that paper which he showed me.

205 Q. Was it a paper like this I show you?

A. I didn't look at it very carefully.

Q. It was an alleged charter-party?

Objected to, that unless it was the paper in question or substantially the paper in question, it should be identified.

A. It was substantially a paper chartering a steamer and giving a bond for the value of it, something of that kind. I looked it through carefully or carelessly, and——

Q. Read it through and see if it was in substance like that?

A. The one that I particularly objected to was a bond of some kind.

Q. Was it this one in substance?

A. It was in substance. I can't remember it, but it was in substance.

Q. I refer to No. 3 for identification which you say was in substance one of them. Was that in substance the other?

A. This one I remember perfectly. This one I distinctly refused.

Q. That is 12 for identification. You declined to execute that?

Mr. HUGHES: I move to strike out the statement in the last answer, "This one I refused," referring to Exhibit 12, as not responsive.

Motion denied. Libellant excepts.

Q. You refused to execute that?

Objected to as leading, incompetent and irrelevant, and not binding on the libellant.

Objection overruled. Libellant excepts.

A. Yes.

Q. Do you know anything about the execution of these charter-parties and agreements of suretyship by Mr. Lord, to all of them?

Mr. HUGHES: You have in your hand 3 and 12.

206 Q. 3, 12, 4 and 5. Do you know anything about that?

Objected to as irrelevant, incompetent; that the witness's knowledge or want of knowledge is immaterial, and as calling for a conclusion.

Objection overruled. Libellant excepts.

A. I don't know anything about it.

Q. Did you ever authorize Mr. Chester S. Lord, either as an officer of the corporation or an individual, or as a trustee, to execute any charter-party for the hiring or demise of the yacht *Kanapaha* or any agreement of suretyship in reference thereto?

Objected to as incompetent, irrelevant and as calling for a conclusion. And further, that the question whether this witness authorized anybody is not pertinent to the issue.

Objection overruled. Libellant excepts.

Q. As an officer of the corporation, as secretary thereof, or in any capacity?

Objection renewed.

Same ruling and exception.

A. I never did.

Q. Throughout the year 1898 you were one of the trustees of the Sun Printing and Publishing Association?

A. I was.

Q. And I believe you attended every meeting of such board of trustees?

A. I did.

Q. At any meeting of the said board of trustees or of the directors of the Sun Printing and Publishing Association was any resolution or motion passed authorizing the execution of any charter-party of this yacht *Kanapaha*, or of any agreement of suretyship in reference thereto?

Objected to on the ground that the question has been already answered, and on the further ground that it is incompetent,
207 and that any action of the board is not binding on the libellant.

Objection overruled. Libellant excepts.

A. There never was.

By the COURT:

Q. Was the subject ever brought up in discussion at any meeting of the board?

Libellant excepts.

A. It never was.

Cross-examined by counsel for libellant.

By Mr. HUGHES:

Q. In what time in April did you have this conversation with Mr. Lord about the signing of the charter-party and bond substantially similar to Exhibits 3 and 12 for identification?

A. About the time of the breaking out of hostilities between this country and Spain.

Q. Do you mean about the 20th of April?

A. I couldn't fix the date excepting that—I couldn't fix the date; it was about the time that the war began.

Q. About the time the war was declared?

A. About the time it seemed to be imminent.

Q. Was it the beginning of the month of April?

A. I couldn't say without looking at the newspapers.

Mr. BARTLETT: You can look at the bond if you desire to refresh your recollection.

The COURT: No, let counsel examine him first.

Q. You were aware that the *Kanapaha* was delivered to the Sun Printing and Publishing Association early in April, 1898, were you not?

A. No, I didn't know anything about it.

Q. Don't you know it now?

A. I only know it by hearsay.

Q. Have you ever known it?

A. I have never known it, no.

Q. You knew that the *Kanapaha* was used by the Sun?

A. I didn't know anything about it.

208 Q. Don't you know it now?

A. I know it now from what you say to me and by this suit.

Q. How recently did you know it?

A. I didn't know it until I heard this vessel was lost, then I saw it in the paper and didn't at all connect it with the Sun.

Q. It is a fact that the boat was used by the Sun?

A. Not to my knowledge.

Q. It is a fact that the yacht was delivered to the Sun, wasn't it?

A. I don't know anything about it; I never saw it.

Q. You were aware that the Sun had boats used during the Spanish war for purposes of observation?

A. Yes.

Q. Did you know what boats they were?
A. No.
Q. Did you know how many there were?
A. No.
Q. Did you know who had obtained them?
A. No.
Q. It was generally known in the Sun office, was it not, that there were boats used by the Sun to obtain information as to the progress of the war?

Objected to as incompetent, improper and irrelevant and immaterial, and on the specific ground that it cannot be within the knowledge of the witness what was generally known by other men.

The COURT: Isn't it admitted that the Sun was making use of this yacht?

Mr. BARTLETT: It is, in our answer.

The COURT: I think it is useless if that has been admitted. I exclude that.

Libellant excepts.

Q. What was Mr. Laffan's connection with the Sun?
A. His title is business manager.
Q. Did he have charge of the financial operations of the Sun business office?
A. The money business, yes, sir; receiving money.
Q. Did you ever hear of the boat *Premier?*
A. No.
Q. Being used by the Sun?
A. No.
Q. Or the *Carbonaro?*
A. No.

209 Q. Did you ever know that the representatives of other newspapers were allowed to go on the Sun's boat to get information?
A. I never heard anything about it at all.
Q. Did you ever hear that the Sun received moneys from other newspapers for giving privileges to reporters on the yacht?
A. That is not my department.
Q. What is your department?
A. Writing financial articles—business.
Q. Do you mean the financial page of the Sun?
A. The Monday morning article I write.
Q. And you confine yourself to that department?
A. I confine myself to that department and writing occasionally editorials on that subject.
Q. You don't concern yourself with the means taken by the editorial department to acquire news?
A. I do not.
Q. Or the facilities for obtaining information for such events as the Spanish war?
A. I do not.
Q. And during the year 1898 you didn't have occasion to familiar-

ize yourself with what was being done by the Sun in connection with the Spanish war?

A. I had no occasion to.

Q. You verified the answer of this case, didn't you?

A. I suppose so, under advice of counsel.

WILBUR J. CHAMBERLIN, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. You are employed by the New York Sun?

A. Yes.

Q. As a reporter?

A. Yes, sir.

Q. And correspondent and have been for some time?

A. Yes, sir.

Q. And were continuously through the year 1898?

A. Yes, sir.

Q. Do you know the yacht *Kanapaha?*

A. Yes, sir.

210 Q. When were you first detailed to go on the yacht *Kanapaha*; if you were?

A. Early in June, I think.

Q. Hadn't you had anything to do with the yacht *Kanapaha* before June, 1898?

A. In April some time I was asked to find a boat.

Q. Who asked you to find a boat?

A. Mr. Lord.

Q. Mr. Chester S. Lord?

A. Mr. Chester S. Lord.

Q. And was that before the boat left New York?

A. That was before the boat left New York.

Q. How long before the boat left New York?

A. A few days, not very long.

Q. Two or three days?

A. I think a little longer than that, perhaps a week.

Q. Had you had any conversation with Capt. Packard with regard to the boat?

A. I had not.

Q. When did you first meet Capt. Packard?

A. The day before the boat left.

Q. And where did you meet him?

A. I don't recollect.

Q. Didn't you go down with Capt. Packard to the boat?

A. No, I met Capt. Packard over in Tebo's basin.

Q. Where the boat was lying?

A. Where the boat was lying.

Q. In Manning's basin?

A. No, I think it was Tebo's.

Q. What did you do when Mr. Lord spoke to you first—some days before, as I understand it—with regard to finding a boat?

Objected to as immaterial, that the boat was delivered, and that is enough.

By the COURT:

Q. Did you find this boat?
A. I found this boat, yes, sir.

By Mr. HUGHES:

Q. With whom did you communicate with regard to it?
A. With Mr. Lord.
Q. Who else?
A. I think that ended my connection with it. I told Mr. Lord——

211 Q. To find the boat?

A. To find the boat I communicated with the various yachting agencies.

By the COURT:

Q. With what other persons, if any, on the part of the Sun Association did you communicate besides Mr. Lord?
A. With no other.
Q. You communicated with Mr. Flint?
A. I saw Mr. Flint, yes, sir.
Q. Charles W. Flint?
A. Yes, sir.

Objected to as to any testimony about Mr. Flint unless it appears it is material in some way.

Q. Do you know how Capt. Packard's services were secured?

The COURT: I exclude that.

Q. After you found this boat, to whom did you report that?
A. To Mr. Lord.
Q. Did you receive instructions to go down to arrange for putting the boat in commission and provisioning the boat?
A. I don't think I did, I think that was done by somebody else, who it was I don't know.
Q. Do you know by whom it was done?
A. No, I do not.
Q. Do you recall positively that you did not arrange for the coaling of the boat?
A. I do not.
Q. You are not certain about that?
A. I am not certain about that.
Q. How about the provisions?
A. I don't think I had anything to do with that.
Q. When you visited the boat at Tebo's dock was she then being put in commission?
A. She was then being put in commission.
Q. Wasn't it being put in commission under your instructions?
A. I can't answer that.

Q. Why not?

A. I don't recollect. Either my instructions or Mr. Lord's instructions.

Q. One of the two?

A. One of the two.

212 Q. You don't know which?

A. I don't know which, I don't recall now.

Q. Do you know White & Co.?

A. No, I do not.

Q. You don't know who they are, what business they do?

A. No.

Q. Did you make any arrangements for paying Capt. Packard?

A. I did not.

Q. At any time?

A. No, sir.

Q. Or for paying the crew for any provisions?

A. Well, not until I went on board the boat.

Q. When did you go on the boat?

A. I think it was about the middle of June, I don't recollect the date.

Q. Was Capt. Packard on the boat?

A. Capt. Packard had left the boat.

Q. When you went on?

A. Yes, sir.

Q. And Capt. Atkinson was on the boat?

A. No, Capt. Seaman.

Q. You arranged for making payments to him from time to time, did you not?

A. I paid Capt. Seaman; I personally paid Capt. Seaman, and sent him north, paid his fare.

Q. Between this time when you went down to Tebo's dock and saw the boat and the time that you went on the boat in July or June, had you anything to do with the *Kanapaha?*

A. Nothing at all.

Q. Will you state what you did do when you went down to Tebo's dock?

A. I think I went down with Mr. Anderson just to see how the work was getting on.

Q. That is Mr. Anderson, of the Sun?

A. That is Mr. Anderson of the Sun.

Q. Mr. H. M. Anderson?

A. Yes.

Q. I show you a paper marked Exhibit 4 for identification and call your attention to the words, "Chester S. Lord for Sun Printing and Publishing Company" or "Association." Are those words in the handwriting of Mr. Chester S. Lord?

Objected to.

213 Q. Are you familiar with Mr. Chester S. Lord's handwriting?

A. I am familiar with his signature.

Q. Have you seen him write?
A. I think I have.
Q. Will you state whether those words that I have read to you are in his handwriting?

Objected to on the ground that one witness has already been examined and made libellant's own witness on the signature, and that the witness has stated the signature was Mr. Lord's handwriting and that he didn't think the rest of it was.

Mr. HUGHES: He said he didn't know and wouldn't say one way or the other.

The COURT: If Mr. Chamberlin knows Mr. Lord's handwriting he can say as to each part of that signature.

A. The signature is Mr. Lord's, the rest of it does not look like his handwriting.
Q. Will you say it is not?
A. No, I will not.
Q. I show you the words "for the Sun Printing and Publishing Company," in Exhibit 3 for identification, after the words "Chester S. Lord" in the superscription, and ask you if those words are in Mr. Lord's handwriting.

Mr. BARTLETT: We admit the papers were signed by Mr. Chester S. Lord. There is no doubt about it.

A. It doesn't look like his handwriting. The signature is his.

By the COURT:

Q. Do you say the same as to 4 as to 3?
A. Yes, sir.

By Mr. HUGHES:

Q. Will you say the additional words are not in his handwriting?
A. I will not.
Q. Will you say the same as to Exhibit 5 for identification?
A. Yes, sir.
Q. And the same as to Exhibit 12 for identification?
A. Yes, sir.

214 Q. Do you know in whose handwriting the words in pencil endorsed on the covers of these papers 3, 4 and 5 are?
A. I don't recognize it.
Q. After you went on the boat in June, 1898, did you give instructions with regard to the movements of the boat, the yacht *Kanapaha?*
A. Yes, sir.
Q. And you were in charge of her, were you not?
A. Yes, sir.
Q. For how long a time?
A. Until the 5th of September, when she was wrecked.
Q. Were you in telegraphic communication with the Sun during that period?
A. Yes, sir.

Q. And corresponding with the Sun?
A. Yes, sir.
Q. And were your expenses paid by the Sun?
A. They were paid by drafts on the Sun.
Q. Did you obtain moneys from the Sun for the expenses of the boat?
A. I obtained moneys by draft.

By the COURT:

Q. You got moneys for the boat by draft on the Sun?
A. I got moneys for myself by drafts on the Sun, and I paid the expenses of the boat.

By Mr. HUGHES:

Q. And reimbursed yourself through the drafts on the Sun?
A. Yes, sir.
Q. Was the boat during the time that you were on in constant use by the Sun for the purpose of obtaining information in regard to the conduct of the war?

Objected to as to the words "by the Sun."

A. She was in use except once or twice, when she was laid up for repairs.
Q. And who paid for the repairs?
A. I did.
Q. And you were reimbursed by drafts on the Sun?
A. Yes, sir.
Q. And where were those repairs put on?
A. I think in Kingston once.
Q. Kingston, Jamaica?
A. Kingston, Jamaica. And she had got so slow that she
215 was almost useless and we pulled her out at St. Thomas and had her fixed up a little.
Q. She wasn't so slow but what she could go 12 miles an hour?
A. Oh, yes, she didn't go but about 7 miles an hour going over to St. Thomas.
Q. Until you cleaned her bottom?
A. Until we cleaned her bottom, then she went from 11 to 12, yes.
Q. What was the occasion of these repairs?

The COURT: I don't believe we want that.

Q. Do you know that the Sun had other boats during this period in use in Cuban waters?

Objected to as irrelevant and immaterial.

By Mr. BARTLETT:

Q. Did you have anything to do with any other boats?
A. I had charge of the Sun's work down there.

By Mr. HUGHES:

Q. What other boats did you have to do with?
A. The *Premier*.
Q. What was the *Premier?*

Objected to as irrelevant and immaterial.

By the COURT:

Q. What was she engaged in?

Mr. BARTLETT: We except.

A. For the Sun? She was a dispatch-boat.

By Mr. HUGHES:

Q. Cruising about to watch the movements of the fleet and so on?
A. Do exactly what other dispatch-boats did, get the news.
Q. Just what the *Kanapaha* did?
A. Yes, sir.
Q. How long was she used for the Sun?

Objected to as irrelevant and immaterial.
Objection overruled. Respondent excepts.

216 A. I don't recollect.

By the COURT:

Q. During what period?
A. I don't recollect.

By Mr. HUGHES:

Q. Was it between June and September, or as early as April?
A. It was in June and I don't think it continued to September.
Q. It was during that summer?
A. It was during that summer, yes, sir.
Q. Did you have anything to do with the *Carbonaro?*
A. When she came down there I had charge of her.
Q. For the Sun?
A. Yes, sir.

By the COURT:

Q. When did she come down?
A. She came down in August, I think, perhaps the latter part of July.

By Mr. HUGHES:

Q. Was she used by the Sun as a dispatch-boat?
A. Yes, sir.

By Mr. BARTLETT:

Q. Did you pay the expenses or some of the expenses that were incurred in connection with the *Premier* and *Carbonaro?*
A. Whenever I was on board and she was in port.

Q. And you were reimbursed in the same manner as you were for the expenses on the *Kanapaha*, by drafts on the Sun?
A. Yes, sir.
Q. Do you know what compensation was to be given to Capt. Packard?
A. I do not.
Q. Are there any statements or reports of yours to the Sun which show anything in connection with payments to Capt. Packard?
A. No, sir.
Q. He had gone and the matter was closed up before you took charge of the boats, as I understand it?
A. Yes, sir.

217 Cross-examined by counsel for respondent.

By Mr. BARTLETT:

Q. Were you on board the yacht when she was lost?
A. I was.
Q. What date was it?
A. The 5th day of September, 1898.

By the COURT:

Q. Where?
A. Off Nuevitas.

By Mr. BARTLETT:

Q. On the coast of Cuba?
A. On the coast of Cuba.

By the COURT:

Q. What coast is that?
A. On the north coast towards the eastern end.

By Mr. BARTLETT:

Q. Did she run on a reef?
A. Yes, sir.
Q. Was the water smooth at the time?
A. Yes, I think it was smooth, there was a little swell on it.
Q. Was there any indication to the eye of the presence of the reef?
A. None at all.

Mr. HUGHES: We object to that. We understand that if a boat runs on a well-known reef the question is not important whether the witness happened to see it or not.
The WITNESS: The water was practically smooth.

Q. And there was no indication——
A. And there was no indication at all of the reef. It was dark.

By the COURT:

Q. What time of day or night was it?
A. It was shortly after seven o'clock, I think about half past seven.

By Mr. BARTLETT:

Q. Was there anything of any sort, any buoy or any light
218 vessel to indicate to you or those on board the *Kanapaha* the presence of the reef?

Objected to on the same ground. Objection overruled. Libellant excepts.

A. No, sir, there was nothing that I could see.
Q. The surface of the water was unbroken at the time?
A. It was.
Q. How far was the reef from the shore?
A. I should think about three miles. I didn't see it until next day.
Q. Were there two lights in the neighborhood on a shoal?
A. There ought to have been two lights.
Q. How far—was one at the entrance of Nuevitas harbor?
A. Yes, sir, one was at the entrance of the harbor.
Q. And the other opposite on Maternillos point?
A. It was a point beyond.

By the COURT:

Q. You say there ought to have been two lights?
A. Yes, sir, I say there ought to have been two lights; the light-houses were there but the lights were not.

By Mr. BARTLETT:

Q. The lights were not burning that night?
A. The lights were not burning that night.
Q. You were on deck?
A. I was on deck, I had just left the br. ge.
Q. At the time of the accident?
A. Yes, sir.
Q. And you could have seen the lights had they been burning?
A. Oh, I was told that I could have seen them.
Q. They were in plain sight from the vessel next day?
A. Next day they were in plain sight from the vessel.
Q. That is the light-houses were?
A. Yes, sir.
Q. Had these lights been destroyed?
A. One of the lights I was told the next day had been destroyed.

219 Mr. HUGHES: I move to strike that out as hearsay.

Q. Did you examine?
A. I sent the captain to examine.

Mr. HUGHES: I move to strike that out.

By the COURT:

Q. Was the weather at the time clear or how when you ran on the reef?
A. It was clear, yes, sir, there was no wind.

By Mr. BARTLETT:

Q. On the chart which was on the vessel at the time was this reef of rocks shown?

Mr. HUGHES: We object. The chart should be produced.

Mr. BARTLETT: The captain has shown it was not on the chart.

The COURT: Are you going to put in evidence to the contrary?

Mr. MURRAY: The captain said it was not down on the chart that he had; but it was shown on other charts. To that extent he has weakened the force of his testimony. We shall offer nothing but documentary evidence.

The COURT; Who supplied the charts for this vessel?

Mr. MURRAY: It was a bare boat charter and the yacht was to be put in commission by the charterer.

Mr. HUGHES: We think the chart should be shown.

Q. Were not all the charts on board lost with the vessel?

A. Yes, sir.

Q. Was this reef of rocks shown on the chart which was on the vessel at the time of the accident?

A. It was not.

220 By the COURT:

Q. Do you know what year that chart was of?

A. It was the last chart published before the boat left here. We got an entire new set of charts for West Indian waters.

By Mr. BARTLETT:

Q. It was the last United States chart?

A. It was the last United States chart.

Q. Published prior to the sailing of the boat from this port?

A. That is what we purchased, yes, sir.

Q. Was there a boat coming right along in your course in the rear of your vessel at the time of the accident?

A. There was.

By the COURT:

Q. What was it?

A. The Norwegian *Albis.*

By Mr. BARTLETT:

Q. A steamer?

A. A steamer.

Q. And she was steering the same course astern of you?

A. Exactly.

Mr. HUGHES: That I object to.

Objection overruled. Libellant excepts.

Q. What happened after your boat was stranded, what did she do?

By the COURT:

Q. How far behind you was she?

A. Perhaps five miles or ten miles; it was so dark I could just see her lights.

By Mr. BARTLETT:

Q. Was a boat sent back from your vessel to her?
A. The captain went off in one of the boats.
Q. Capt. Atkinson?
A. Yes, sir.

221 By the COURT:

Q. To signal her?
A. To ask her to stand by until morning. We had signalled her with guns and lights.

By Mr. BARTLETT:

Q. Was there the usual lookout on the vessel at the time of the accident?
A. On the *Kanapaha?* Yes, sir.
Q. Had the captain been on the bridge with you just prior to the stranding of the boat?
A. He had.
Q. And was he standing down on the deck right near the bridge at the time, was he somewheres on the deck?
A. He was on the deck; yes, sir; I think he was just about going on the bridge again. Three of us were standing on the bridge with glasses trying to make out these lights, we ought to have seen them an hour before.
Q. That is, the two extinguished light-houses?
A. Yes, sir.
Q. Was the vessel going at the normal rate of speed at that time?
A. About the normal rate; yes, sir.
Q. About eleven knots?
A. About eleven knots, ten and a half to eleven.
Q. Was the stranding of the vessel caused by the extinguishing of these lights?

Mr. HUGHES: We object to that as calling for a conclusion and as incompetent.

The COURT: I sustain the objection. I think you are entitled to ask him whether he was misled at all as to their position in consequence of the absence of the lights.

Q. Were you misled as to the position of your vessel by the absence of these two lights which should have been burning in the light-house near the entrance to Nuevitas harbor on that night?

Mr. HUGHES: We object to that as immaterial, that this witness was not navigating the vessel.

222 The COURT: He may state what he knows about it. Has the captain been examined on this subject?

By the COURT:

Q. Had you anything to do with the navigation?

A. Nothing at all.

(Balance of testimony to be taken in chambers.)

NEW YORK, *April* 17, 1899.

Testimony Continued in Judge's Chambers.

Present: Mr. Hughes for the libellant; Mr. Bartlett for the claimant.

Mr. HUGHES: Mr. Bartlett, I understand that *subpœna duces tecum* has been served for the production of the letters from Chubb & Sons to the Sun Printing & Publishing Association, under date of April 7, 1898, June 3, 1898, July 12, 1898, and July 29, 1898, and I understand that Mr. —— says that he has made a careful search, and is unable to find those letters.

Mr. BARTLETT: We haven't got them.

Mr. HUGHES: In view of the fact that you are not able to find them, will you accept now an oral notice to produce them so that we may have secondary evidence?

Mr. BARTLETT: We will accept nothing; you had weeks and months to prepare this case for trial.

223 CHAMBERLAIN further examined.

By Mr. HUGHES:

Q. When did you leave the *Kanapaha?*

A. When she was wrecked.

Q. Did you go away after seven o'clock in the evening of September 5th, or half past seven?

A. No, I think it was about two hours and a half or three hours afterwards; whenever the captain directed that everybody should go.

Q. Did you ever return to the yacht?

A. Yes, I was back I think two days afterward, or a day afterward.

Q. When you left the yacht on the evening of the accident was there water in her?

A. I don't know.

Q. Did you take away the log?

A. I don't know that; the captain had all to do with that.

Q. Don't you know, as matter of fact, that the captain did not take away the log?

A. I did not.

Q. Did you have any conversation with him about taking away the log?

A. I did not.

Q. Do you know whether any effort was made to save the charts or log?

A. I don't know.

Q. You have never had any interview with the captain about that?

A. No, I don't know anything about those things. I am not a seaman.

Q. Have you ever seen the log since that time?

A. No.

Q. I mean since the accident? You know what the log is, do you?

A. It is a record of what the boat does on the voyage. I never have seen it; I don't know anything about it.

Q. You have never asked the captain for it?

A. No.

Mr. BARTLETT: Mr. Chamberlain, when Mr. Hughes asks the same question, as he invariably does, the second or third time, don't answer.

Q. What was the last port that you left prior to the accident?

A. Cape Haytien.

224 Q. Do you know how far that is from Nuevitas?

A. No, I do not.

Q. Do you know about how far it is?

A. No, I don't think that I do.

Q. What time did you leave Cape Haytien?

A. We left there about one o'clock—between 12 and 1 o'clock on Sunday preceding the wreck; that was the day before.

Q. Then the wreck was on Monday evening?

A. The wreck was on Monday evening, about 7.

Q. Did you leave between 12 and 1 o'clock that night?

A. No, between 12 and 1 in the afternoon.

Q. Of Sunday?

A. Of Sunday.

Q. What was the weather from that time until the time of the accident?

A. It was very fair.

Q. And the sea calm?

A. The sea was calm. There is always a pretty big roll.

Q. And swell?

A. Swell coming through the Windward passage.

Q. Did you have any fog during that time?

A. I don't think so, I don't remember any.

Q. Do you remember where you were on the morning of Monday, the day of the accident?

A. I do not; I think we had passed the eastern end of Cuba, and I remember the captain was somewhat delighted because the lights were lit all right; he feared the lights would not be lit.

Q. Did he say that to you?

A. He said that to me; he said the lights were lit. He spoke of that particular light.

Q. When did he say to you that he feared they would not be lit on the Cuban coast?

A. I do not think he said he feared they would not be lit; I think he said he was glad they were lit; that was on the morning after we passed the eastern end of Cuba, Cape Maysi, I think.

Q. So that during Monday you were along the coast of Cuba proceeding westwardly?

A. I think so; my recollection isn't absolute about that. We kept pretty well within sight of the land.

Q. Throughout the day?

A. Throughout the day.

225 Q. Do you remember at what time the sun set?

A. No, sir.

Q. About what time?

A. My recollection is about an hour before the wreck, before we ran ashore.

Q. Were you on deck at about that time?

A. It wasn't an hour before we ran ashore, because I was on deck as it became dark; I don't mean on deck, I mean on the bridge, and for some time before that we had been looking through the glasses for these lights; the captain said we ought to see those headlands before it became dark, and we were looking for those.

Q. You had occasion to look at the coast too, didn't you?

A. I don't remember that, I presume we did, I don't know.

Q. You were in sight of land at sunset?

A. I think so.

Q. How long after sunset was it that it became dark as you call it?

A. I don't recollect that, I don't think I noticed the sunset at all.

Q. You hold no master's license?

A. Oh, no.

Q. You have never navigated any boat?

A. Never.

Q. While you directed the movements of the *Kanapaha* indicating what places she should go, everything was entrusted to the captain?

A. Absolutely.

Q. At the time of the accident the captain was Capt. Atkinson?

A. Yes, sir.

Q. And he had been employed and joined the yacht while you were there?

A. He had joined the yacht about the time that I joined her. He had been employed in my absence.

Q. Was he there when you went on board?

A. No, sir, he was not there then.

Q. He came subsequently?

A. I think I put him aboard the boat.

Q. What compensation did he get?

A. I can't tell you absolutely, I think it was $150 a month; I paid him—on behalf of the Sun.

Q. Did you have any instructions about the return of the boat?

226 Mr. BARTLETT: I don't know what you mean, what kind of instructions?

Q. Did you receive instructions as to bringing the boat back to New York before the wreck?

A. No, that was left entirely to me I think; I had been ordered from Ponce to Havana.

Q. Who ordered you from Ponce to Havana?

A. I don't recollect now, it came from Mr. Lord; I got cable instructions.

Q. It came from the Sun office?

A. Came from the Sun office, but I don't know from whom.

Q. You know that much, that it came from the Sun office?

Mr. BARTLETT: Don't be lured by the form of the question.

Q. State the fact whether you do not know that it came from the Sun office?

A. I assume that it came from the Sun office. I got a cablegram ordering me to go to Havana.

Cross-examined by Mr. BARTLETT:

Q. Did I understand you to say on your previous direct examination, that before the yacht *Kanapaha* left this port you or Captain Packard got the latest charts for her?

A. That was my understanding; I think she was delayed a little while until we got the charts. I had just a general sort of direction in the first place about them and Captain Packard I think got the charts himself.

Q. Do you know how many there were?

A. No, I do not.

By Mr. HUGHES:

Q. When you say "we got the charts," whom do you mean by "we"?

A. I mean myself and Mr. Lord from the Sun.

227 ALBERT LEE, a witness called for the libellants, being duly sworn and examined, testified:

By Mr. HUGHES:

Q. What is your occupation?

A. I am editor of Harper's Round Table.

Q. Were you editor of Harper's Round Table in the spring of 1898?

A. Yes, sir.

Q. March of that year?

A. Yes, sir.

Q. State whether or not you went to the office of The New York Sun, the respondent here, to make arrangements to have a representative on the *Kanapaha*.

A. I went there to see Mr. Kellogg, to find out if the Sun was going to have any representative or boat down there during the war.

Q. When you say Mr. Kellogg to whom do you refer?

A. He is the city editor of the Sun.

Q. Mr. Daniel Kellogg?

A. Mr. Daniel Kellogg.

Q. When did you go to see him?
A. It was some time in March; I don't know what day.
Q. State what conversation you had with him about it.

Mr. BARTLETT: I object as irrelevant, immaterial, incompetent and improper, and as having taken place, if such conversation did take place, prior to this charter-party.
Counsel go before the judge.
Objection sustained. Mr. Hughes excepts.

Q. In consequence of the conversation with Mr. Kellogg, the city editor of the Sun, did you have an interview with any one in the Sun office with regard to having a representative on the *Kanapaha?*
A. Yes; I went and spoke to Mr. Chester S. Lord.
Q. Will you state what conversation you had with Mr. Lord?

Mr. BARTLETT: I object as incompetent, immaterial, irrel-
228 evant and improper, and on said ground that it calls for an interview prior to the making of the charter-party.
Counsel go before the judge.
Objection overruled. Mr. Bartlett excepts.

A. As I recollect it, I told Mr. Lord that Harper Brothers would like to find out what arrangements the Sun was making for the naval war with Cuba, and he said that there were plans now on foot for chartering a yacht and sending it down there with representatives on board. I asked if Harper's and the Sun could come to some arrangement by which representatives from Harper's Weekly could go down there, and he said that it could be made if I would speak to the proper persons in Harpers Brothers' and have them come over, some representative person like the editor of the Weekly, that he would be glad to see him. I took Mr. Payne over there the next day and introduced him, Mr. H. G. Payne, the managing editor of Harper's Weekly.

Cross-examined by Mr. BARTLETT:

Q. Are you the editor of the Bazaar?
A. No, sir; of the Harper's Round Table.
Q. What is that?
A. That is a monthly magazine for boys; it used to be Harper's Young People.
Q. How did they find out that you had this conversation with Mr. Lord?
A. They asked me.
Q. When did they come to see you?
A. Oh, no; they found it out this way: I used to be on the Sun myself.
Q. I mean how did Mr. Murray and Mr. Hughes find out?
A. I don't know how Mr. Murray found out.
Q. Do you know how the attorneys on the other side found out that you had that conversation with Mr. Lord?
A. I know that at the time I had the conversation I spoke to Mr. Harriman, of Mr. Murray's office, a year ago.

Q. How did you come to talk with him about it?

A. We lunched together two or three times a week.

229 Q. You lunched with a clerk in Mr. Murray's office?

A. I don't know whether he is a clerk or not.

Q. Is he an attorney in the office?

A. Yes, sir.

Q. At the time you lunched with him you told Mr. Harriman that you had had a conversation with Mr. Lord?

A. I told him that I expected to have charge of running the Weekly's end of the war news because Mr. Payne was going to the war, or I thought he was going at the time.

Q. And that you had had a conversation with one of the editors of the Sun about it?

A. Yes, sir.

Q. And through that conversation with Mr. Harriman you assume you are subpœnaed now?

A. I suppose so, yes.

Q. Did you tell Mr. Harriman all the details?

A. Oh, no; I mentioned them to him, I suppose. Of course he told me that he was interested in this case and I naturally was interested in it and that was the way I knew anything about it.

Q. When did he tell you that he was interested?

A. I suppose it was when the thing first came up.

Q. When was that?

A. I do not know.

Q. When was the libel filed—was it last autumn?

A. It must have been as long ago as that.

Q. And last autumn Mr. Harriman told you that his office had got a suit against the Sun?

A. Words to that effect.

Q. And thereupon you told him that you could give some evidence?

A. I don't know what I told him; I probably expressed some interest in the matter, because I had been interested in it at the start, and I remember reading about the wreck and all that sort of thing.

Q. And then you told him of the conversation with Mr. Lord?

A. Oh, no.

Q. When did you first tell him about that?

A. I don't know that I ever told him about that conversation.

Q. When did you first tell him that you could be a witness?

A. I never told him that.

Q. They must have known something about your knowledge to subpœna you?

A. I have no doubt that they did.

230 Q. When did you first give any evidence?

A. I couldn't tell you, because any information that they got from me was purely conversational and came up as I would talk about any news of the day over the lunch table without any idea of the case.

Q. You had no idea at the time that you would be required to estify?

A. Not the slightest. I hadn't any idea of being subpœnaed even today.

Q. When were you first subpœnaed?

A. This afternoon.

Q. Was the first information given you that you would be made a witness this afternoon?

A. Yes, sir.

Q. Is Mr. Harriman still in the same office?

A. Yes, sir; he gave me the subpœna; we had no conversation about the testimony.

Q. Not since the case came up?

A. Oh, yes; I have asked him since the case was first coming out.

Q. Has he ever talked with you about giving testimony?

A. I told him I wouldn't at one time, and that was the first we ever talked about it. I told him I didn't want to have anything to do with it.

Q. Is he here?

A. No.

Proctors for libellants serve notice to produce on proctors for respondents, four letters written by Chubb & Sons or by members of that firm to the respondent, or to an officer or director thereof, dated respectively April 7, June 3, July 12, and July 29, 1898.

AARON H. BRADLEY, a witness called for the libellants, being duly sworn and examined, testified:

By Mr. HUGHES:

Q. You reside in New York city?

A. Yes, sir.

Q. What is your occupation?

A. I am the advertising manager of the New York Sun.

Q. Are you a notary public?

A. I am, sir.

231 Q. Were you such in 1898?

A. Yes, sir.

Q. Do you know Mr. Chester S. Lord, the managing editor of the New York Sun?

A. I do.

Q. You knew him in 1898?

A. I did, sir.

Q. And you were employed by the Sun in 1898?

A. Yes, sir.

Q. Through that year?

A. Yes.

Q. I show you a paper which has been marked for identification "5" in this proceeding, and I call your attention to the certificate of acknowledgment on that paper and I ask you whether the signature to the certificate of acknowledgment is your signature.

A. It is, sir.

Q. And the seal is your seal?
A. Yes, sir.
Q. And you took that acknowledgment?
A. Yes, sir.
Q. And Mr. Chester S. Lord appeared before you personally and acknowledged what is there stated in that certificate?
A. He did, sir.
Q. Was this subscription to the instrument "Chester S. Lord, for the Sun Printing and Publishing Association," on that instrument at the time you took the acknowledgment?
A. I couldn't say, sir.
Q. You have no recollection?
A. I have no recollection about that.
Q. Haven't you a recollection that there was a signature there when you took the acknowledgment?
A. No, sir. Mr. Lord signed it at that time to the best of my recollection and belief.

Cross-examined by Mr. BARTLETT:

Q. But you don't know whether the words "for the Sun Printing and Publishing Association" were there at the time?
A. I do not.

By Mr. HUGHES:

Q. You will not say they were not?

Mr. BARTLETT: Don't answer that.
Mr. HUGHES: Do you object to it?
Mr. BARTLETT: I object as incompetent, improper, irrelevant and immaterial, and on the special ground that the counsel should not be permitted to cross-examine his own witness.
232 Counsel went before the judge.
Objection overruled.
Mr. Bartlett excepts.
A. No, I will not say they were not.

PERCY CHUBB, a witness called for the libellant, being duly examined and sworn, testifies:

By Mr. HUGHES:

Q. You are a member of the firm of Chubb & Sons?
A. Yes, sir.
Q. Insurance brokers in the city of New York?
A. Marine underwriters.
Q. Your brother is Sidney Chubb who was examined in this case this morning?
A. Yes.
Q. Did you have any negotiations leading to the insurance which was effected upon the yacht *Kanapaha* for the period April 1st or 2nd to June 1st or 2nd, 1898, and the subsequent months?
A. Yes.

Q. State, please, what took place with regard to such negotiations?
A. Some one from the Sun office called on me.

Mr. Bartlett objects as too broad and general.
Mr. HUGHES (to the stenographer): Take his answer.
Mr. BARTLETT: No, he must state who it was——
Mr. HUGHES: You can move to strike it out.
Mr. BARTLETT: No.

Q. Some one called upon you, you say?
A. Yes.
Q. Was this at the outset of the negotiations to which you refer?
A. Yes, sir.
Q. Will you please state as definitely as you can who the person was and what was said and done with regard to the insurance upon the yacht *Kanapaha?*

233 Objected to unless he identifies the person by name.
The WITNESS: I cannot do that.

Q. You did have a conversation with some one relative to the insurance?
A. I did.
Q. Have you got those bills here?

Mr. BARTLETT: The bills are in.
Mr. HUGHES: We only want to look at them. They are in the other room.

Q. Did the person who called upon you state from whom he came?

Objected to unless the person is first identified.
Mr. HUGHES: I am not asking what he said; I am merely asking whether he stated from whom he came or not.
Mr. BARTLETT: That admits the answer yes or no.

A. Yes.
Q. Did you in consequence of the interview you had with such person effect insurance upon the yacht *Kanapaha* for the period April to June, 1898?
A. On account of that and subsequent interviews or orders.
Q. Did you obtain policies of insurance?
A. We did.
Q. The policies of insurance which were produced by your brother this morning?
A. Yes.
Q. To whom did you send those policies?
A. I don't remember.

Mr. BARTLETT (addressing Mr. Hughes): You don't assume they were sent to us, do you, not one of them is in our possession?
Mr. HUGHES: You paid for them.

Q. Mr. Chubb, I show you a letter dated April 7, 1898, or a copy of a letter; can you state whether the signature to that letter is your signature or that of your brother?

A. It is mine.

234 Q. This is your letter-press copy book of Chubb & Sons in which this letter is found on that date?

A. It is.

Q. I refer to Libellant's Exhibit 5 for identification. Can you state whether the original of that letter was sent to the Sun Printing and Publishing Company?

A. I believe it was.

Mr. Bartlett objects to what the witness believes.

Q. Did you have any subsequent interview or correspondence relative to the insurance on the yacht *Kanapaha* after that letter?

A. We had some negotiations afterwards.

Q. With whom did you have such negotiations?

A. I cannot remember.

Q. You mean you cannot remember the names of the individuals?

A. I cannot remember the names of the individuals, only the fact that some such interview took place.

Q. Relative to the insurance?

A. Relative to the insurance.

Q. I show you a letter dated June 3, 1898, in your letter-press copy book. Is the signature to that letter your signature?

A. It is.

Q. Was that letter sent to the Sun Printing and Publishing Company by Chubb & Son?

A. I believe so.

Q. Subsequently did you send these bills that are marked Libellant's Exhibits 8, 9 and 10 to the Sun Printing and Publishing Association and receive the amount therefor?

A. They were sent from our office.

Q. That is these bills were sent out from the office?

A. The office of Chubb & Son.

Q. And were subsequently paid?

A. They so show.

Cross-examined by Mr. BARTLETT:

Q. Don't you know as a matter of fact that all of those twenty policies of marine insurance which were produced by your brother this morning have remained all the time in the office of Chubb & Son?

A. I believe so.

235 Q. And there is no basis for the theory of counsel on the other side that they were sent to the Sun, is there, in point of fact?

A. No.

Q. And they appear all made out in one form to C. T. Bowring & Co., were they not?

Objected to on the ground that the policies show for themselves how they were made out and have all been introduced.

Q. You didn't deposit any of these letters in the mail box? You didn't stamp these letters and deposit them in the mail box with your own hand, did you?

A. No, sir.

By Mr. HUGHES:

Q. You have a mail bureau in your office?

A. We have.

By Mr. BARTLETT:

Q. But you cannot swear of your own knowledge as to whether they were sent or not?

A. No.

ERVIN WARDMAN, a witness called for the libellants, being duly sworn and examined, testified:

By Mr. HUGHES:

Q. What is your occupation?

A. I am a newspaper man.

Q. On what papers are you employed?

A. The New York Press.

Q. In what capacity?

A. Editor and publisher.

Q. Were you employed in that capacity in the year 1898?

A. Yes, sir.

Q. In the spring or summer of 1898 did you have any negotiations relative to having a reporter of the Press on the yacht *Kanapaha?*

A. In the spring, yes.

Q. About what time?

A. Early in April, I think. It was in April; I won't be sure whether it was early, of 1898.

236 Q. Whom did you see with reference to the matter?

A. I saw Mr. Chamberlin of the Sun.

Q. Mr. W. J. Chamberlin, who is present here?

A. Mr. Wilbur Chamberlin, yes, sir.

Q. Did you see anybody else?

A. No.

Q. Did you make your arrangements with Mr. Chamberlin?

A. Practically, as far as I went with him, yes.

Q. Was there a representative of the Press put on board the *Kanapaha* in pursuance of that arrangement?

A. There was.

Q. And payments were made to the Sun for it?

A. Yes.

No cross-examination.

DEWITT C. PACKARD, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. You are a mariner, are you not?
A. Yes, sir.
Q. How long have you been such?
A. For twenty odd years.
Q. By whom are you employed at the present time?
A. By Flint & Company.
Q. Of this city?
A. Yes, sir.
Q. You have been employed by them for some time?
A. Five years.
Q. Do you know the yacht *Kanapaha?*
A. I do.
Q. You were captain of the yacht *Kanapaha* for a time, were you not?
A. I was.
Q. For how long?
A. Two months.
Q. Beginning with what time?
A. About the first of April, 1898.
Q. Do you remember when you first went on the yacht *Kanapaha?*
A. I do.
Q. Will you give me the date as nearly as possible?
237 A. It was during the first week of April; I don't remember the date.
Q. Where was she lying when you went aboard of her?
A. At Tebo's yacht basin, at the foot of 23rd street, Brooklyn.
Q. Have you ever met Mr. Chester S. Lord, of the New York Sun?
A. I met him once.
Q. When was that?
A. It was during the first week in April.
Q. In connection with the *Kanapaha?*
A. No, sir, practically so, yes, sir; I was called to Mr. Flint's office and there I was introduced to Mr. Lord, and they began to talk of chartering a boat.
Q. And about having you as captain?
A. There was nothing said about that; I think they were told that I would be a suitable man.
Mr. BARTLETT: Don't tell what you think.
A. (continued). I was called over there.
Q. I suppose you being called over there had some reference to your getting and going on the boat?
A. Yes, sir.
Q. And you talked with Mr. Lord about that, didn't you?
A. I think I was more of a listener than anything else.
Q. Subsequently you went on board the boat, didn't you?
A. I did, yes sir.

Q. Did you go to the Sun office?

A. Yes, sir.

Q. When did you go to the office of the New York Sun?

A. That was, I should think, about the latter part of the first week in April; about the 5th or 6th, I can't tell the date.

Q. You sailed away from New York with the *Kanapaha*, didn't you?

A. I did.

Q. And this visit to the New York Sun was prior to that time?

A. Prior to that time.

Q. How long prior?

A. I guess it was all done in two or three days. I saw Mr. Chamberlin and Mr. Anderson at the office of the New York Sun.

238 Q. Did you arrange with them about going on the yacht?

A. There was nothing said about it.

Q. When you saw them was it understood that you were going on the yacht?

A. It was understood; I took it for granted. I didn't think about it at all.

Mr. Bartlett moves to strike out that it was "understood."

A. I only suppose that; there was nothing said about it.

Q. Who suggested that you should go to the Sun office?

A. I called up the Sun office by telephone; I was told to come there.

Q. Do you mean you were telephoned to—did you call up the Sun office on the telephone?

A. I was in New Brunswick, on a yacht, and there was a man there that expected me and told me to report at the Sun office.

Q. Do you know who the man was?

A. No, I don't know his name; he was—the message came over a telephone, there, and there was a man in New Brunswick——

Q. New Brunswick, New Jersey?

A. Yes, New Brunswick, New Jersey, and I came over to New York in response to that, and called at the Sun office.

Q. Please state what took place at the Sun office, all you can recall?

A. There is very little, if anything. They made a date with me to meet Mr. Thomas Manning and we went out to try to find out the owner of the yacht *Vamoose*. The *Kanapaha* had not been mentioned at that time.

Q. Who are "we"?

A. Mr. Chamberlin and Mr. Anderson and myself were talking about it. But I left them and went in search of Mr. Manning, and we went and tried to find the owner of the *Vamoose*, and we did find him eventually.

Q. Mr. Manning is a yachtman?

A. Yes, sir, and we did find the owner eventually, after an almost all-night hunt, and the yacht had been verbally chartered over the telephone, and we went back——

239 Q. Over what telephone?
A. Over the telephone.
Q. From the Sun office?
A. I don't know.
Q. Who told you that?
Objected to as immaterial and irrelevant.

Q. You went on board the *Kanapaha* after you left Mr. Chamberlain and Mr. Anderson?
A. Yes, sir; Mr. Lord asked me in Mr. Flint's office—I told him that the *Vamoose* wasn't suitable for the business, and I told them about the *Kanapaha* and two or three others; I thought over the matter——
Q. Suitable for what business?
A. Running dispatches during the war. I mentioned the yacht *Kanapaha*, among others, as suitable for the business.
Q. You got a letter to deliver to the person in charge of the yacht *Kanapaha;* I show you this paper, marked Ex. 1?
A. I know there was a letter, but I don't know whether it was given to me or sent over.
Q. You recall taking that letter down with you to the boat?
A. I did not take it there.
Q. Do you remember that a man by the name of Petersen——
A. I don't know him.
Q. You know there is such a man?
A. There is a good many of them in Brooklyn.
Q. Olaf Petersen?
A. Yes, I know him. I was busy attending to outside matters, and when I got down there the letter had been delivered and the *Kanapaha* had been towed from Manning's basin into Tebo's basin; all done without me.
Q. Did you have any talk with Mr. Chamberlain when you went to Tebo's basin; did you see him there?
A. He came there two or three times.
Q. Did he tell you who brought that boat over from Manning's basin?
A. He did not; some of my crew and Mr. Olaf Petersen brought her over, and two tugboats.
Q. You employed the crew at that time?
A. Yes, sir.
Q. Did you look after putting the vessel in commission and getting provisions and coal?
A. Yes, sir.
240 Q. Do you know who are White & Company?
A. Yes, sir; they are ship chandlers on South street.
Q. Did you purchase provisions from them?
A. I did.
Q. For the yacht *Kanapaha?*
A. Yes, sir.
Q. Did you send in vouchers for your expenses?
A. Yes.

Q. To whom?

A. I O K'd some in Brooklyn, and some in Key West. After I arrived in Key West I didn't send them into the Sun office myself; I turned them over to John R. Spears, who was the chief representative on the boat, of the Sun.

Q. Those that you did send in direct you sent to the Sun office?

A. I did so—I don't remember whether I sent any there, or O K'd them and sent them to the firms and let them send them in.

Q. Who paid you your compensation?

A. Mr. Spears.

Q. Every time that you were paid?

A. I was only paid once.

Q. Was that at the end?

A. That was at the end.

Q. You left the boat in June?

A. The first of June, yes, sir.

Q. Where did you leave the boat?

A. In Key West.

Q. And you were paid there by Mr. Spears?

A. Yes, sir.

Q. For the entire time?

A. Yes, sir.

Q. That is, beginning with the time you first went?

A. Yes, sir.

Q. Was there any money advanced to you other than the moneys you received for your compensation from time to time?

A. No, sir.

Q. For expenses?

A. I had some money of my own which I used as far as it went, and then Mr. Spears paid my bills.

Q. So that whatever you were entitled to receive for your outlays or wages you got from Mr. Spears, ultimately.

A. Mr. Spears, yes, sir.

241 Cross-examined by Mr. BARTLETT:

Q. Before you left New York did you get certain charts of the Cuban coast?

A. Yes, sir.

Q. All the latest charts you could find?

A. All the latest charts I could find of the West Indies islands; it would be hard to tell which I got.

Q. Where did you get them from; the Hydrographic office?

A. I think I got them from Negus, on Water street.

Q. Did you get them after consultation with Flint & Co.?

A. No, sir; I got them myself; I knew myself.

Q. You got the latest charts of the Cuban waters which, up to that time, had been published by the United States Government, or any department thereof?

A. That is what I asked for, and I looked at them, and I was satisfied with them at the time.

Q. And you took them on the yacht?
A. They sent them to the yacht.
Q. And you saw them on the *Kanapaha?*
A. I used them on the coast of Cuba for the two months that I was down there.
Q. And you left them there?
A. I left them there.
Q. When you left the yacht?
A. Yes, sir.

Redirect examination by Mr. HUGHES:

Q. Do I understand that you got all the publications of the Hydrographic office of the United States relative to Cuban waters?
A. No, sir; I didn't say so. I got all that I thought I needed from Negus.
Q. Did you pay for those yourself?
A. No, sir.
Q. You sent in a voucher for them?
A. I O K'd the voucher. I presume I did, for the bills would have to come to me to be paid, and while I don't remember that individual bill I presume I O K'd them for Negus, or sent them to the Sun office. Things were a little mixed up about that time.
Q. The bill wasn't made out to you?
A. Oh, no, sir.
Q. It was made out to the Sun?
242 A. I don't know; I only know that it was a bill of the charts. I don't remember how it was made out, or any other bill.
Q. And the name of the firm is Negus & Company?
A. It is Negus; whether it is Negus & Sons or Negus & Company I don't remember.
Q. You say that you personally did not take this letter; did you send it down by some one?
A. I don't remember how it got there.
Q. You know it was sent there?
A. It was sent there; it got there.
Q. It was sent by your directions?
A. That I can't say; Mr. Manning may have sent it down, or he may have sent it down and given it to one of my crew, and one of my crew delivered it.
Q. You saw the letter?
A. No, I didn't see the letter; when I got down there she had been towed around to Tebo's.

FRANK BOWNE JONES, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. You reside in New York?
A. I do.
Q. What is your business?

A. Yacht and ship broker.

Q. You have been in the business for some time?

A. I have been in the business professionally for about two years.

Q. You have been connected with it——

A. I have been connected with it all my life.

Q. You have done business in the city of New York?

A. Always.

Q. You have had occasion to enter into transactions for the sale of yachts?

A. Yes, sir.

Q. Steam yachts?

A. Yes, sir.

Q. And for the chartering of steam yachts?

A. Yes, sir.

243 Q. That is your business, in fact?

A. That is my business entirely.

Q. Will you state whether there is any market value for steam yachts?

Objected to as incompetent, improper, irrelevant and immaterial, and on the further ground that the qualification of the witness has not been shown.

Cross-examined by Mr. BARTLETT:

Q. How many yachts have you ever bought?

A. I am at present doing more business than any one in New York except Lemoyne.

Q. How long have you been in business as a yacht broker?

A. I said two years.

Q. How old are you?

A. Thirty-five.

Q. What was your business before that?

A. I was the representative of the Grain Elevator Company in New York, and also with Otis Bros.

Q. What kind of elevators are they? Do they elevate grain?

A. They elevate people.

Q. They put lifts in buildings, is that it?

A. Yes.

Q. Where is the parent office of that company?

A. The company is no longer in existence.

Q. Did it fail?

A. No, it was incorporated with the Otis Bros. Company.

Q. Then you were in this lift business until two years ago?

A. Making my living, yes.

Q. Then did you start out as a yacht broker?

A. Yes, sir; I have been a yachtsman for a great many years; I am secretary of the Yacht Racing Union of North America; it comprises all the yacht clubs in the United States.

Q. A sort of a yacht trust, is it?

A. A yacht alliance.

Q. An association of all the yacht clubs?
A. Yes, sir.
Q. You are no relation of Pembroke Jones?
A. No.
Q. Do you own a yacht now?
A. Not at present; I can't afford to own a steam yacht.
244 Q. Have you ever bought a steam yacht?
A. Yes.
Q. For yourself?
A. Personally, no sir.
Q. Have you ever sold a steam yacht for yourself personally?
A. No, sir.
Q. How many steam yachts have you bought for other people?
A. It is impossible for me to say without looking at my books.
Q. Can't you tell us?
A. No, I could not.
Q. Approximately?
A. I wouldn't want to do so, no.
Q. Have you bought one?
A. Yes.
Q. Have you bought two?
A. I had rather not make any statement as to how many I have bought or sold.
Q. But I would rather you would, because you come here as an expert.
A. I have done more in chartering yachts than in selling.
Q. Give us the name of one steam yacht that you have bought?
A. How do you mean bought? We don't buy, we sell.
Q. I suppose that occasionally a steam yacht is bought or sold, aren't they?
A. Yes; that is, we act for the seller and not for the buyer.
Q. You may act for both, or for one. Have you ever acted as the agent of a person who bought a steam yacht?
A. No, sir.
Q. Then you never have bought either personally or as agent for another, or as broker for another, a steam yacht?
A. No, sir.
Q. Have you ever sold for another person a steam yacht?
A. Yes.
Q. When?
A. That is—I am not allowed to say what boats I have sold or I have not sold. I wouldn't consider myself privileged; it is my private business.
Q. If you come here to testify as an expert you will have to tell, or else you won't be allowed to testify. You can't give us the benefit of your conclusions without telling us on what they are based. What steam yacht have you ever bought?
A. I said that I had never bought one.
245 Q. What steam yacht have you ever sold?
A. That I don't care to answer.
Q. Do you refuse to answer?
A. Yes.

By Mr. HUGHES:

Q. You have sold steam yachts?
A. Yes.

By Mr. BARTLETT:

Q. Give us the name of one steam yacht that you have ever sold for another person?
A. That I decline to answer.
Mr. BARTLETT: Mr. Hughes, you are surely not going to offer him as an expert?
Mr. HUGHES: I do.
Mr. BARTLETT: I object to his answer.
The COURT: I sustain the objection, but all questions on damages are reserved; without prejudice to either party, the evidence is for the present excluded.

Examination of this witness is suspended.

FERDINAND B. KNIGHT, a witness called for the libellant, being duly sworn and examined, testified:

By Mr. HUGHES:

Q. You are a master mariner?
A. Yes.
Q. How long have you been such?
A. On sailing vessels ten years. I have just received my appointment on steamers now.
Q. You have cruised about Cuban waters?
A. Yes, sir; for the last two years on the Ward line, the New York & Cuba Mail Steamship Company.
Q. In what capacity have you been in the Ward line?
A. Third, second and chief officer.
Q. Running to what ports?
246 A. Havana and Mexico, Santiago, Manzanilla, Cienfuegos, Guantanamo and Nassau.
Q. How were you employed during the Spanish war?
A. Chief officer on the steamship *Vigilancia*.
Q. Running where?
A. Employed by the United States Government, carrying troops to Santiago from Tampico.
Q. Have you had occasion to cruise along the north coast of Cuba?
A. Yes, sir.
Q. Frequently?
A. About two weeks ago I returned from there.
Q. For how long a time have you been familiar with the north coast of Cuba?
A. When I was in sailing vessels, most of my voyages were there, possibly 5 or 6 times during the year I would go there in sailing vssels to Nuevitas and different ports.
Q. Have you acted as pilot at all along there?

A. Yes, sir.
Q. In and about the harbors on the north coast of Cuba?
A. Yes, sir.
Q. Do you know Nuevitas harbor?
A. Yes, sir.
Q. Are you able to take vessels in and out of Nuevitas harbor?
A. Yes.
Q. You know the old Bahama channel?
A. Yes.
Q. And the course from Cape Haytien through the old Bahama channel to Havana?
A. Cape Haytien is another island. Yes, sir; I can take a ship from Cape Haytien through the old Bahama channel.
Q. I understand you have been in Nuevitas harbor?
A. Yes.
Q. Do you know Nuevas Grandes and Nuevitas del Principe?
A. Yes, sir.
Q. How far are they apart (showing chart to witness)?

Mr. Bartlett objects to paper being shown witness.

247 A. Nuevas Grandes is at the mouth of the river, and the entrance of the Nuevitas river I should say was about 12 miles, perhaps 15.

Q. That is from Nuevas Grandes to the mouth of the Nuevitas harbor?
A. Yes, sir.
Q. Is there a reef along the Cuban coast between these points?
A. There is a reef lying about 7 to 9 miles from the eastern point, about two miles off the eastern point is the entrance of Nuevitas harbor.
Q. Lying 7 to 9 miles E. N. E.?
A. Running parallel with the shore, very near.
Q. How near to the shore?
A. The outer edge in places is fully a mile and three-quarters or a mile and a half off.
Q. Running how far out?
A. In places it was a mile and a half to a mile and three-quarters about, and it narrows up as you go towards Nuevas Grandes until it gets within half a mile of the shore.
Q. Is there more than one reef off Point Nuevitas, the mouth of the harbor, or 7 miles to the east of there?
A. One continuo-s reef.
Q. There is only one?
A. Only one that I know anything about.
Q. I show you a chart published by the English admiralty, chart of the West Indies——

Objected to.

Q. (continued). And I ask you if the reef you have mentioned is the reef indicated on that chart by the dotted line——

Objected to.

Q. (continued). Running from Point Nuevitas down here to Nuevas Grandes——

Objected to.

Question withdrawn.

248 Q. I show you what purports to be a map or chart and ask you whether you find on that map or chart any line indicating the reef which you have mentioned so that you can identify it?

Objected to as incompetent, improper, irrelevant and immaterial, and on the special ground that the witness should not be shown a chart which has not been offered in evidence.

Answer is taken subject to decision of the court.

A. It starts in there, and it is dangerous down as far as there (indicating).

Q. You are pointing to a dotted line that appears on this map?

A. That is the outside edge of the reef where the little dots are; that is what you put on a chart to show a reef; here is the ocean here.

Q. Then what you point out is this dotted line running from Point Nuevitas del Principe to Nuevas Grandes and is the line of the reef that you have spoken of?

A. The one that I have referred to, yes.

The chart is offered in evidence and is marked 16 for identification of this date.

Q. That reef is well known to navigators, is it not?

Objected to as incompetent, irrelevant, improper and immaterial.

Question withdrawn.

Q. Can you state from your experience of those harbors whether that reef is a well-known reef?

Same objection, and on the specific ground that the witness cannot state as to the information of other persons.

Examination suspended and James Jacob Lewis examined.

249 JAMES JACOB LEWIS, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. What is your employment?

A. Engineer, sir.

Q. Where?

A. Steam yacht *Lagonda*.

Q. Were you ever employed on the steam yacht *Kanapaha?*

A. I was, sir.

Q. Were you on the steamer *Kanapaha* prior to the time that she went to Cuban waters in 1898?

A. I was employed on her at that time, but I was in Philadelphia; my wife was dead and I couldn't go in the yacht.

Q. You were employed on the yacht prior to that time for some time?
A. Yes, sir, up to the first day of April, 1898.
Q. You had been employed for some time before?
A. For seven years.
Q. You were familiar with the yacht?
A. I was, sir.
Q. Can you tell how high the bridge of the yacht *Kanapaha* was above the water line?
A. I can, sir.
Q. Will you please state?
A. 14 feet 2 inches from the water line to the platform on the bridge where a man stood on her.

Cross-examined by Mr. BARTLETT:

Q. How did you come to testify here today?
A. Mr. Murray.
Q. When?
A. Some time ago.
Q. How did he find you?
A. He found me by Mr. Moore; I was in a yacht, and Mr. Moore knowed where I am all the time.
Q. How do you know the height of the bridge?
A. I measured it; we had an argument here about three or four years ago about a man getting washed off the bridge of a yacht to sea, and we measured the distance on the *Kanapaha*, the captain and me and somebody else, to see how high it was; how high the sea would be before it would wash a man off the bridge, and I could say positive that it was 14 feet 2 inches, or 14 feet 4 inches at
250 the outside. It wasn't more than two inches out of the way.
Q. What was the length of the *Kanapaha?*
A. She was 187 feet.
Q. What was her tonnage?
A. Her tonnage was 240 ton gross.
Q. What was her beam?
A. Beam 23½ feet.

By Mr. HUGHES:

Q. Do you know how much water she drew?
A. She drew 10.10 when she was loaded with coal; that is, loaded.

Examination of FERDINAND B. KNIGHT continued:

Counsel went before the judge for the ruling as to objections to former questions.
Objection to last question to Knight overruled. Mr. Bartlett excepts.

A. Yes.
Q. Were you acquainted with the current through the old Bahama channel?
A. Yes.

Q. Will you describe the current?

A. The current runs about S. W. from N. E. ordinarily. On the full and change of the moon it is stronger than it is at other times.

Q. How is the current known?

A. We call it the old Bahama channel current. It runs into the gulf as it goes up by the Salt Cay bank.

Q. Do you know where this current starts?

A. We noticed it was more perceptible off Cape Lucretia.

Q. It started with the equatorial current?

A. Yes, sir, it is a part of that.

Q. Will you state whether or not there is a division off the east end of Cuba?

A. Yes, sir.

Q. How does the current run from there?

A. The south side of Cuba?

Q. It divides, does it not?

A. Yes, sir.

Q. In what manner?

A. Passes either side of the island, goes to the southward on the south side of Cuba and to the southwest on the north side.

251 Q. How is that current on the north side?

A. Ordinarily half a knot or a knot; but I have seen it as high as two knots an hour on the full and change of the moon.

Q. Can you describe the current off Point Nuevitas del Principe?

A. It sets in shore there pretty well, in towards the land a little, or running a little more to the southward, about S. S. W. in towards the bights, but as you draw down near the old Bahama channel it runs straight there.

Q. How swift is the current within 7 or 10 miles of Point Nuevitas del Principe, that is 7 or 10 miles to the east of that point?

A. We make a practice of allowing two knots an hour.

Q. That is a well-known current to navigators?

A. Yes; that is generally well known among people who coast there a great deal.

Mr. Bartlett moves to strke out the answer as incompetent, improper, irrelevant and immaterial, and not possibly within the knowledge of the witness, and as assuming facts not proven.

Q. Can you state how far the light at Mantanillas and the Eastern Point light at the harbor of Nuevitas del Principe can be seen when lit?

A. Eastern Point light is visible—I won't be certain, but—12 miles—Mantanillas cay 17.

Q. Do you know Cape Lucretia?

A. Yes, sir.

Q. About how far is that from Nuevitas del Principe?

A. I cannot tell you accurately, 75 miles.

Q. That is to the eastward?

A. Yes, sir.

Q. On the north coast of Cuba?

A. On the north coast of Cuba.

Q. Will you describe the character of the coast from Cape Lucretia to Nuevitas del Principe?

A. The coast is bold and high in the vicinity of Cape Lucretia as far down as Nuevas Grandes. It tapers down and shows up at Nuevas Grandes.

Q. How is it at Nuevas Grandes?

A. Not very high.

252 Q. Isn't there a high point at Point Manati?

A. There is some high land; it is not extraordinary high. It is high land in the interior.

Q. How far is Point Manati from Nuevitas del Principe about?

A. 40 miles.

Q. How far did you say Nuevitas del Principe was from Nuevas Grandes?

A. I can't tell you exactly, but I should judge 25 miles, more than that, 30 miles.

Q. Haven't you stated that it was something like 12 or 13 miles between those points?

A. From Nuevas Grandes to Nuevitas?

Q. Yes, to the harbor of Nuevitas.

A. The harbor is right in front of the town. Nuevitas del Principe is the harbor.

Q. That is the point I mean, the eastern light there?

A. That is not the harbor, that is the entrance to the bay.

Q. How far is it from the eastern light to Nuevas Grandes?

A. About 10 miles.

Q. What I mean by the eastern light is the Eastern Point light of Nuevitas harbor?

A. Yes, sir.

Q. And it is about 10 miles from there to Nuevas Grandes?

A. No, it is more than that, nearer 20 or 25 miles.

Q. I show you the United States chart of the West Indies and island of Cuba——

Objected to on the ground that the chart shown the witness is not in evidence, the chart being issued by the department subsequent to the wrecking of the vessel.

Mr. HUGHES: I merely want to know whether you can by looking at this chart refresh your recollection as to the distance from the Eastern Point light to Nuevas Grandes so as to be able to state from your memory how far that is?

Objected to on the ground that it is an attempt to cross-examine the libellant's own witness.

Taken subject to objection.

253 A. 17 miles.

Q. Is there not near Nuevas Grandes some high ground?

A. Little hummocks, not extremely high.

Q. Enough to enable one to take reckonings?

A. Yes, we take bearings there.

Q. You take bearings off Nuevas Grandes?

A. Yes, sir.

Q. Now take 4 or 5 miles east of Nuevas Grandes, can you tell me how far you can see the shore at that point in daylight?

A. The coast line, 10 miles.

Q. Suppose that you are standing on a vessel 14 feet above the water line, can you tell me how far you could see the shore, say five miles to the east of Nuevas Grandes?

Objected to as incompetent, improper, irrelevant and immaterial, and on the ground that it is hypothetical, depending on the eyesight of a particular individual, the time of day, the light and the condition of the atmosphere.

Taken subject to objection.

A. Five miles east of Nuevas Grandes?

Q. Along there from Nuevas Grandes, say 5 miles along the coast?

Objected to as incompetent, improper, irrelevant and immaterial.

Taken subject to objection.

A. From 14 feet elevation, twelve miles.

Q. How far with a glass?

Objected to as incompetent, improper, irrelevant and immaterial.

Taken subject to objection.

A. I could not answer that question; some glasses are more powerful than others.

Q. With a powerful glass?

254 Objected to as incompetent, improper, irrelevant and immaterial.

Taken subject to objection.

A. 14 miles.

Q. Can you state whether in those waters and out about that part of the coast there is any particular clearness or otherwise about sunset in the atmosphere?

A. I have noticed at sunrise and sunset——

Mr. BARTLETT: You are asked about this particular place.

The WITNESS: Yes, sir.

Q. What have you noticed regarding that?

A. At sunrise and sunset objects are more definite than they are during the middle of the day.

Q. And you can see certainly as far as you can at any other time during the day?

A. Yes, sir; that is a well-known fact among seafaring men, particularly at sunrise.

Q. And similarly at sunset?

A. Yes, sir.

Q. Will you please explain what you mean by taking bearings, showing what you do, that is bearings from the land such as you say can be taken off Nuevas Grandes?

A. Taking bearings is to locate your position by the compass, a compass bearing of any point that you wish to get the distance of.

Q. Can you get your distance off shore in that way?

A. Yes, sir.

Q. Will you explain how you do it?

Objected to as immaterial, incompetent, irrelevant and improper, and on the ground that this is not an educational institution.

Counsel go before the court.

Objection overruled. Mr. Bartlett excepts.

A. For instance, a ship is steering north to make an object bearing northwest; the ship is going 12 miles an hour, which is
255 a mile in five minutes. Take the time when the object bears northwest and again when it bears west, and the time elapsed calculated with the distance the ship is making, will give you the distance the ship is off from the object when it bears west or when it is abeam.

Q. Am I to understand that the taking of such bearings as you have said could be taken off Nuevas Grandes, would enable you to verify your supposed position off shore?

A. Yes, sir.

Q. Am I to understand that the taking of these bearings can be done at Point Manati or Point Nuevas Grandes?

A. Point Nuevas Grandes; yes, it can be done there.

Q. Or any other known point indicated on the chart which the mariner has?

A. Wherever there is a headland or promontory or any other point that we can distinguish on the coast.

Q. Suppose you were going through the old Bahama channel and at sunset were in sight of the coast and were about 18 or 20 miles east from the Eastern Point light and within sight of land at about Nuevas Grandes, what would it be proper to do to ascertain your true position?

Objected to as immaterial, incompetent, irrelevant and improper.

Counsel go before the court.

Objection overruled. Mr. Bartlett excepts.

A. I don't understand that question. Cross-bearings——

Q. (Question repeated to witness.)

A. Cross-bearings and chart, two prominent headlands——

Q. I will ask you whether in steaming along the north coast of Cuba on a northwesterly course to make the old Bahama channel and at a rate of from 11 to 12 knots an hour, so that at about half past seven the steamer is found about 7 miles east of the Eastern Point light, it would be possible in clear weather if you were
256 in sight of shore most of the day, to ascertain up to and including sunset the true position of the steamer?

Same objection, ruling and exception.

A. Yes, sir.

Q. I would like to ask you whether in steaming along the north

coast of Cuba at a rate of about 11 to 12 knots an hour, a northwesterly course to make the old Bahama channel, so that at about half past seven o'clock in the afternoon you are found about 7 miles east from the Eastern Point light of Nuevitas, it would be possible by taking observations and bearings in the course of the day to ascertain whether a current was or was not setting you in towards the shore?

Same objection, ruling and exception.

A. It would be possible to ascertain during the day that you had been set inshore.

Q. Suppose you were taking a northwesterly course and along the north coast of Cuba, bound for the old Bahama channel and expecting to see Manzanilla light off Nuevitas harbor about the time it became dark, and you were at sunset about 18 miles east of Nuevitas harbor. Failing to see the light at dark, what would you do?

Objected to as immaterial, incompetent, irrelevant and improper, and on the specific ground that it assumes facts not proven and on the further specific ground that it is hypothetical and calls for a conclusion of the witness.

Same ruling and exception.

A. Stop and steer off shore.

Q. Will you explain why?

Same objection, ruling and exception.

A. It isn't safe to run for an object when you expect to see it and don't see it; it isn't safe to run your distance up.

Q. If an object bears 15 miles from you it isn't safe to run
257 15 miles towards it if you don't see it. If it is visible 15 miles and you didn't see it, it isn't safe to continue on 15 miles without seeing it.

Q. And the proper course would be to stand off shore?

Same objection.

Question withdrawn.

(Hearing resumed before the court.)

By Mr. HUGHES:

Q. Are there not sailing directions issued by the Hydrographic office, which are in use among seamen, navigators?

A. Yes, sir.

Q. Giving full directions as to sailing points, reefs, and so on?

A. Yes, sir.

Q. And it is customary to have these sailing directions that are issued by the Hydrographic office of the United States?

A. Yes, sir.

Q. That is customary for navigators to have them?

A. Yes, sir.

Q. In sailing about Cuban waters?

A. Yes, sir.

By the COURT:

Q. What ones would you specify for Cuban waters?

A. The Hydrographic office issues a very good copy for Caribbean sea and West India islands; the title is, "Caribbean Sea and West India Islands."

Q. The same for that region as the Coast Pilot for this coast?

A. Yes, sir.

Q. Some sort of collection of directions?

A. Yes, sir; giving directions of entrance and approaches to the different harbors, character of the headlands and color of the different light-houses and beacons on the coast; and Bahama banks, giving them specific directions in regard to sailing around them; the character of the keys, and so forth, and color of the water.

Q. Is it customary for vessels to have those sailing directions?

A. It is customary for the captains to have them.

258 Q. As part of the equipment of the ship?

A. Of his equipment; yes, sir.

Q. For whatever voyage he goes upon?

A. Yes, sir.

By Mr. HUGHES:

Q. You say the publication you have mentioned is of the Caribbean sea and gulf of Mexico. Is this that I show you, No. 86 of the United States Hydrographic office?

A. Yes, sir; that is one of them. It comes in two volumes.

Q. And this is volume 1, which has in it the sailing directions for the north coast of Cuba?

A. Yes, sir.

Q. In chapter 6. I call your attention——

The book is marked Libellant's Exhibit 17 for identification.

Q. I call your attention to pp. 126 and 127 of this book (No. 17 for identification) under the title "Port Nuevitas del Principe." Is that Port Nuevitas del Principe the port at which the Maternillos and Eastern Point lights are which have been mentioned in the testimony?

A. The Eastern Point light-house marks the approach of one side and Maternillos light the other side.

Q. Maternillos you can see 17 miles?

A. Visible 17 miles.

Q. And the Eastern Point, how much?

A. About 12 as near as I can remember.

The COURT: Which is the one that was out that night?

Mr. HUGHES: They claim both were out. He has testified they ought to have stood off shore when they didn't see that.

The COURT: Had they located their position positively at that time?

Mr. HUGHES: Yes; by their captain. The captain had been sailing all along the coast all day and could have ascertained by several points his exact location. For example, at sunset he could have

told exactly where he was. The captain says he took no
259 observations to ascertain where he was and no bearings, that is Capt. Atkinson.

Q. I call your attention to the statement in these Sailings Directions, pp. 126 and 127, under title, "Port Nuevitas del Principe from Nuevas Grandes the coast takes a northwest direction for 13 miles"——

Mr. BARTLETT: I object to that unless the book is put in evidence.

The COURT: I must receive this.

Q. (Reading)—"to Nuevitas del Principe is skirted by a reef all the way and should not be approached within two and a half miles." I will ask you whether the reef mentioned there is this reef to which you have testified which skirts the coast running easterly from Port Nuevitas del Principe?

A. Yes, sir.

Q. The reef which you have testified to was well known?

A. Yes, sir.

Cross-examined by counsel for respondent.

By Mr. BARTLETT:

Q. With whom have you talked about this case?

A. I wasn't aware of anything of the kind until ten o'clock this morning.

Q. Who came to see you about it?

A. A gentleman from that gentleman's office.

Q. From Mr. Murray's office?

A. Yes, sir.

Q. How did they come to send to you, do you know?

A. As I understand it they sent to the New York & Cuban Mail Steamship Company for some captain to describe this coast, and I was sent up by the general manager of our company.

Q. Of the Ward line?

A. Of the Ward line.

Q. And you have just received a certificate as master of a steam vessel?

A. No, sir, I hold a certificate as master of a steam vessel for over two years.

Q. What have you just received?

A. Been appointed to a ship here in the Ward line today.

Q. What ship is that?

A. *City of Washington.*

260 Q. How often were you in Nuevitas harbor in the year 1898?

A. In the year 1898? In 1898 I wasn't in Nuevitas harbor at all.

Q. How often did you sail by Nuevitas harbor in the year 1898?

A. Four times going and coming.

Q. When, on what occasion? What months?

A. I don't exactly remember the date. It was the month that we took the soldiers from Tampa over to Santiago, we passed there going over; returned for another lot, carried them the same way and went back again; four times.

Q. Did you have occasion on those occasions to go through this channel?

A. Yes, each time.

Q. Have you ever been in Nuevitas harbor?

A. Yes, sir.

Q. How many years ago?

A. Last time was in '97—'96.

Q. When was the last time in the year 1898 that you passed Nuevitas harbor? Was it in May or June?

A. Just after the battle of Cervera.

Q. About the 6th of July?

A. Either the 6th or 8th, I can't remember.

Q. Were the lights of those light-houses burning then?

A. They were not.

Q. Or at any time when you went by the harbor in that year?

A. The last trip we made from Tampa to Santiago the lights were lit.

Q. When was that?

A. That was in August.

Q. Do you swear to that?

A. No, that was later. That was in October.

Q. And the previous trip was when?

A. The previous one to that one.

Q. Was it the July trip? Previous to your October trip was it the July trip?

A. September.

Q. What part of September?

A. Somewhere about the latter part.

Q. Were the lights lit then?

A. I didn't see them, no sir. We passed there in the daytime.

Q. In July and in May they were not lit, were they?

A. In May, no.

261 Q. Nor in July?

A. Nor in July.

Q. And you passed once in May and once in July?

A. Passed once in June, the first of June, and once—passed twice in June, that is, going and coming.

Q. Going and coming and return?

A. Going over and returning.

Q. And the lights were not lit then?

A. The lights were not lit then, at least we didn't see them.

Q. And in July, was that the next trip?

A. Yes.

Q. The lights were not lit then?

A. We passed there in the daytime.

Q. And the next occasion was October?

A. October.

By the COURT:

Q. Then they were lit?

A. Yes, the lights were lit then, we got there just before dawn. I saw Maternillos light, but not Eastern Point light, because it was turned out; it was daylight when we passed there; we didn't go up to Maternillos light until sunrise, they put the lights out at sunrise.

By Mr. BARTLETT:

Q. Did you have any conversation today about your testimony?

A. Conversation in regard to my testimony today? No, sir, any more than I was requested to come up here and tell what I have told.

Q You were not told as to the character of the questions?

—. No, sir.

Q. No conversation with anybody about that?

A. No, sir; no more than what I have just said. I was asked to state my knowledge in regard to that coast, what I knew of the coast, that is all.

Q. Do you know Capt. Atkinson?

A. I do not; no, sir.

Q. When did you first see—when you were subpœnaed this morning did you come to the court-room here or go to Mr. Murray's office?

A. I went to Mr. Murray's office with a gentleman and was told that I was wanted here.

262 Q. Whom did you see at Mr. Murray's office?

A. I saw this gentleman.

Q. And then you talked about the case?

A. He asked what my knowledge was about the coast of Cuba and I told him my experience there from a young man.

Q. Did you look at any charts then?

A. No, sir.

Q. In the office?

A. Oh, yes, I did, too. I saw a chart of the coast of Cuba and I was asked if that was one I used.

Q. Where was that?

A. At Mr. Murray's office.

Q. And that was this morning?

A. That was this morning.

Q. Was that one of the charts as to which you have been examined this afternoon?

A. I couldn't say. It was one of the same issue.

Q. One of the same series?

A. Yes, sir.

Q. It was either that or a copy, wasn't it?

A. It was a chart, the same kind of chart.

Q. Did you indicate to Mr. Murray then the outline of this reef running along it?

A. No, sir.

Q. What did you indicate, different points on the chart?

A. I don't know that I indicated anything. I was asked if I knew what that chart was and if I was in the habit of using that chart, and I told him that I was, always used that United States chart in preference to any other, as I considered it the most accurate. They are issued yearly and corrected right up to every two or three months and we use them in preference to any other because we work in connection with the Hydrographic office ourselves.

Q. Then the United States chart corrected up to the latest date is the best chart for a navigator in Cuban waters to have, is it?

A. I think so.

Q. And you consider it better than the British admiralty chart?

A. I don't know because I am not in the habit of using the British admiralty coast charts. For general charts, yes, sir; the North Atlantic and South Atlantic, I have used them.

Q. Have you ever used the British admiralty chart of Cuban waters?

A. Never.

263 Q. Never have seen them?

A. Yes, sir.

Q. But never used them?

A. Never used them.

Q. And have never taken them on your cruises in Cuban waters?

A. I have had them aboard ships I have been on, as property of the ship.

Q. That happened to be there, but you have taken for your own guidance the charts issued by the United States Government, corrected up to the latest date?

A. Yes, sir.

Q. A chart such as this which has been marked for identification?

Mr. HUGHES: It has not been marked for identification.

Q. Such as this chart corrected up to November 1st, 1898, is?

A. Hydrographic chart; yes, sir.

Q. A chart such as that you consider the best for the navigator's guidance in Cuban waters?

A. Yes, sir; there are charts on a larger scale than that that are far better than that.

Q. Did they tell you where the *Kanapaha* was wrecked?

A. I don't remember that they did; I can't say. I knew that she was wrecked, I knew at the time she was wrecked; I was down there myself, but I don't know that any one has told me where she was wrecked.

Q. Don't you know where she was wrecked?

A. I know she was wrecked on the reef.

Q. On the reef as to which you have testified?

A. Yes, I knew that before I came here.

Redirect by counsel for libellant.

By Mr. HUGHES:

Q. These United States charts you have spoken of are used in connection with the sailing directions which you have mentioned?
A. Yes, sir.
Q. That is this Exhibit 17 for identification?
A. Yes, sir.
Q. Can you tell me how these charts are corrected from time to time up to date?
264 A. By observations taken by such men as I am who pass these places and notice anything unusual or notice the distance has been made out wrong. And the United States have regular men-of-war that go there and recalculate distances.
Q. You saw the *Kanapaha* when she was down there cruising about, didn't you?
A. Yes, sir.
Q. During the summer of 1898?
A. Yes, I saw her down there.
Q. Did you ever see her flag?
A. I saw her flag flying "New York Sun," which I suppose was her flag.
Q. On the boat?
A. On the mast; yes, sir.

WILBUR J. CHAMBERLIN, recalled for respondent, testifies:

By Mr. BARTLETT:

Q. Was the chart that was on board the *Kanapaha* at the time of the wreck and which was lost with it, one of the series issued at the Hydrographic office in the Navy Department in Washington, D. C.?
A. It was.

By the COURT:

Q. Do you know the date of the chart?
A. I do not.

The COURT: Of course it must have been the one immediately preceding. You can find a copy of that if you inquire where they supply these charts they undoubtedly have got one there, and if you care to look you will very likely find there is no change whatever as to this particular thing.

By Mr. HUGHES:

Q. The chart that you got about the 1st of April, 1898, was the last chart which had been issued in the Hydrographic office prior to that date?
A. As I understand it.

Mr. HUGHES: Will you admit that the words "for the Sun
265 Printing and Publishing Association" in ink after the signature "Chester S. Lord" in the papers marked for identification Nos. 3, 4, 5 and 12, were written by Chester S. Lord?

Mr. BARTLETT: We will admit for the purpose of this action that they were written by him.

The COURT: For the purpose of this action they may be treated as having been written by him.

Mr. BARTLETT: Yes.

Mr. HUGHES: At the time he wrote his signature, of course.

Mr. BARTLETT: I don't know when he wrote it, but that does not make any difference.

The COURT: That will be presumed if there is nothing to the contrary.

Adjourned to 1.30 p. m. Thursday, April 20, 1899, at which time the case is to be argued orally.

NEW YORK, *April* 24, 1899.

Met pursuant to adjournment.

CARL W. JUNGEN, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. What is your occupation?

A. I am lieutenant in the U. S. Navy, in charge of the branch Hydrographic office in this city.

Q. You are familiar with the charts of the Cuban waters issued by the United States Hydrographic office, are you not?

A. I am.

Q. I show you a chart and will ask you if this is a chart of the Cuban waters showing the north coast of Cuba as the same was according to the issue prior to April 1, 1898; that is, showing no corrections later than April 1, 1898?

266

A. The latest correction shown on this chart here is October, 1897.

Q. This is a United States chart, is it not?

A. Yes, it is.

Q. Issued by the Hydrographic office?

A. Yes, sir.

Q. What number?

A. Number 947.

Mr. HUGHES: We offer the chart in evidence.

Preliminary cross by counsel for respondent.

By Mr. BARTLETT:

Q. Has that chart been in your custody?

A. That particular chart? I had it this morning to compare with a standard chart in our office. Do you mean to say was it issued from our office? No, sir; that was issued from the Hydrographic office in Washington and probably was—unless it was used by some Government vessel—purchased by the owner of it from a Government agent.

Q. What I wish to ascertain is, did this chart come from your office or did the attorneys produce it and show it to you?

A. The attorneys produced it and showed it to me.

Q. Do you know where they got it, of your own knowledge?

A. Only from hearsay, not from my own knowledge.

Q. This chart was not in your office, this is not a record from your office?

A. No, sir; it is not.

Q. Have you some like this that are records?

A. I have one exactly like it that I compared that one with.

Q. Couldn't you have brought that here?

A. I could have brought it here, but I have not any authority to remove any of the records from the office.

Q. Is this an exact copy of yours?

A. This is an exact copy of ours up to the date, and the last correction made on here—that is, a correction that was made on the plate—the Roman letters here indicate the month and the year is after in Arabic letters.

Q. But you have not been through every inch of this chart yourself?

A. I have compared it very closely.

Q. Have you compared it?

A. I have compared it myself.

267 Q. Have you compared it with reference to the harbor of Nuevitas, with reference to the approaches to the harbor of Nuevitas?

A. Yes, sir.

By the COURT:

Q. Do you know where charts are printed that are supplied to the public for sale?

A. Yes, sir; they are printed by the bureau equipment under the supervision of the Hydrographic office in Washington. They are engraved and they are sold in these ports by the agents of the Government.

Q. Are you not familiar with this issue of charts like this?

A. Am I familiar with the issue of them?

Q. With the printing and issue of such charts as that?

A. I know the charts are published there and are delivered to agents; that is all I know about it. I have never had anything to do with the making of one of those charts.

Q. You are not in the habit of seeing them?

A. Certainly I am. I am particularly familiar with that chart.

Q. Are you familiar with this class of charts?

A. Yes, sir.

Q. Don't you know from the appearance of this chart whether it was one that was issued by the Government?

A. I certainly do.

Q. When was it issued?

A. We received it in our office in October, 1897.

The chart is admitted in evidence. It is marked Libellant's Exhibit 19, April 24, 1899.

By Mr. HUGHES:

Q. I see in the corner of this chart that has just been marked in evidence a statement referring to notice to mariners. Are notices to mariners published from time to time by the Hydrographic office in Washington?

A. They are.

Q. Are you familiar with such notices?

A. I am.

Q. I show you a paper headed "Notice to mariners, Washington, October 22, 1898; No. 43." I will ask you if that is the offi-
268 cial notice of that date from the Hydrographic office?

Mr. BARTLETT: I object to this as incompetent, irrelevant, immaterial and as not the best evidence.

The COURT: He may testify whatever he knows about the issue of such a notice as this to mariners.

Mr. BARTLETT: I except.

A. This is a document that is issued by the Hydrographic office in Washington of which we have received a large number, and distributed them as official.

By the COURT:

Q. Do you know when you received it?

A. I cannot tell the exact date when it was received, but it was shortly after its publication.

Q. Do you know when that was?

Mr. BARTLETT: October 22, 1898, was after the wreck of the vessel. I except to the testimony as incompetent, improper, and on the ground that it appears that the paper was issued subsequently to the stranding of the vessel.

Mr. HUGHES: This is the official notice from the Government office, produced from the custody of the witness, he having received it in the course of his public employment in the Government office, and is the official statement as to where the wreck of the *Kanapaha* lies.

The COURT: I cannot allow that. The position is not controverted, is it?

Mr. HUGHES: This is slightly different from what Capt. Atkinson testifies. This fixes it definitely so that there can be no dispute about it. This official record is a high grade of evidence on that subject.

The COURT: I must exclude that.

269 By Mr. HUGHES:

Q. I understand that this paper that I show you was received by you from Washington and was produced from your custody?

A. Yes, sir.

Mr. HUGHES: We offer the paper in evidence.

Mr. BARTLETT: I object to it as incompetent, improper, irrelevant, immaterial, and as not the best evidence of any facts therein stated, and as having been issued subsequent to the wrecking of the vessel.

The COURT: I understood that to be offered as proof of the fact as to the position of the wreck of the *Kanapaha*, which is recited in it. I exclude it as secondary evidence.

Mr. HUGHES: We except.

The paper is marked Libellant's Exhibit 20 for identification, April 24, 1899.

Q. Are you familiar with the sailing directions issued from time to time by the U. S. Hydrographic office for the use of mariners, the official publication?

A. You ask me if I am familiar with them? I am familiar with the use of them.

Q. You are familiar with the fact that there are such sailing directions published officially?

A. Yes, sir.

Q. And you have them?

A. We have a complete file of them at our office.

Q. I ask you whether this book I now show you is the official publication of the United States Hydrographic office with reference to the Caribbean sea and the gulf of Mexico and adjacent waters issued in 1892?

A. It is.

Mr. HUGHES: I offer in evidence pps. 122 and 123 of the book.

Mr. BARTLETT: I object to it as incompetent, improper, irrelevant, immaterial, and as not the best evidence of the facts therein stated.

Mr. HUGHES: The language is precisely the same as in Exhibit 17 which was of 1898.

270 Objection overruled. Respondent excepts.

Mr. HUGHES: I read in evidence from page 5 of the edition of 1892, under the head of "Squalls—currents" the following:

"On the north coast of Cuba as far west as Matanzas the current almost always sets to the westward with a force varying from ½ knot to 3 and even at times 4 knots. This westerly current is felt, but with less constancy, on the eastern side of the Bahama banks and islands, and is due partly to the constant trade wind acting on the surface of the sea and is partly a continuation of the great equitorial current which is deflected to the N.W., by the coast of South America and moves swiftly and steadily through the passage between the islands of Trinidad and Granada. Though not invariable, the experienced navigator should vigilantly guard against the effects of this probable current by never losing an opportunity by night or day of verifying his position."

Mr. BARTLETT: We object to this as incompetent, improper, irrelevant, immaterial, and as not the best evidence of the facts therein stated.

Objection overruled. Respondent excepts.

The book is marked Libellant's Exhibit 21 for identification, April 24, 1899.

Cross-examined by counsel for respondent.

By Mr. BARTLETT:

Q. When did you get the book of 1898 in your office dated April 29th?

A. I was not in the office at that time. I have not been in charge of the office except since December, 1898. That copy is probably in the office. I have not looked for it. I looked at one this morning.

Q. You don't know anything about it?

A. I know that is an official copy.

The COURT: On that testimony I should not pay any attention to the one of 1898.

271 Q. Did you give this book to Mr. Murray?

A. I did not.

Q. The one of 1892 I refer to?

A. I did not.

Q. Have you ever seen it before?

A. Yes, I saw it last Saturday.

Q. Where?

A. In his office.

Q. Did Mr. Murray send for you?

A. I went there myself. I had a subpœna and I wanted to know why I was summoned.

Q. When did he subpœna you?

A. Last Saturday, to come here today at half past one. I knew nothing of the case.

Q. You had no previous conversation?

A. No, sir.

Q. Did he produce this book then?

A. I saw that book in his office then and I looked it over. I presume it is the same book—sailing directions for the coast of Cuba and the Caribbean sea and the gulf of Mexico.

Q. I show to you the first page of this book and ask you under the word "issued" what date appears?

A. May 4, 1898.

Q. This book did not come from your office?

A. Not to my knowledge. I don't think it did; we don't give away any of those books.

Q. Part of this is printed upside down?

A. If you will let me look at it I will tell you whether part is printed upside down or not.

Q. I mean bound upside down.

A. It is probably—as are great many of those publications in the bureau of equipment from time to time—corrected. It refers here to "lights;" this was probably rebound and sent to an agent to sell and the date it was sent to the agent for sale is the date there and it does not refer at all to the——

Q. I don't ask you that. Lieutenant, where were you stationed before you went to the Hydrographic office?

A. I was on the U. S. S. *Vermont* for one month prior to my going to the Hydrographic office.

Q. And before that, last summer, where were you?

A. I was in command of an auxilliary vessel during the war.

272 Q. Your advent to the Hydrographic office in New York was in December, 1898?

A. Yes, sir.

Q. For the first time?

A. For the first time.

Q. And you had not been engaged in any hydrographic work prior to that for some years?

A. Not as I know of.

Q. Had you been in the Hydrographic bureau in Washington?

A. No, sir.

Q. Will you swear that there was no edition of this book, No. 86, issued between the edition of 1898 and the edition of 1892?

A. I will not.

Q. Do you know anything about it?

A. I can find out from the records.

Q. No. Do you know anything about it?

A. I don't know anything about it except from the records.

Q. That is what you can ascertain. Do you know today, on the stand, as you are now, whether there was any edition between those dates?

A. I do not.

Mr. HUGHES: I now read from Libellant's Exhibit 21 for identification, the date of the imprint, "Washington; Government Printing Office, 1892." Also the date of the preface, "U. S. Hydrographic Office, March 27, 1892."

Redirect by counsel for libellant.

By Mr. HUGHES:

Q. I call your attention to the fact that the parts offered in evidence on pages 122 and 123 in regard to the reef, and read in evidence on page 5 with regard to the squalls and currents are in the original type, and I will ask you whether corrections made in this book subsequent to the original date of issue are not indicated in blue print at the tops of the various pages?

A. That refers you to a light list with regard to any changes made with reference to lights.

Q. I ask you if the corrections, or statements or additions after the original date of issue are not in blue stamp?

Mr. BARTLETT: I object to that as leading.

273 A. I don't know that I quite understand you. That calls attention to a change, possibly, in the char-cter of the light.

Mr. BARTLETT: I object to that as guessing; that unless the witness stamped them on and knows something about it he is not competent to testify.

Mr. HUGHES: I wish to call the attention of the court to the fact that the changes after the different issues are stamped on the pages.

Mr. BARTLETT: Who put those blue marks on? It doesn't matter, it is of no consequence.

The COURT: If the witness is acquainted with any explanation more than appears on the face of the book it is proper to allow him to testify to it.

By the COURT:

Q. On various pages of this book I find stamped at the upper right-hand corner the words "refer to light list"?

A. Yes, sir; I see that.

Q. Have you any knowledge with regard to the stamping of those words here, anything more than what appears?

A. If that is official? I know what it refers to, yes, sir. Is that what you want to know?

Q. If you do know, yes. What knowledge have you about this?

A. The light-house board publishes what they call a "light list, buoys, beacons and aids to navigation," and the latest changes——

Q. How often are those changes made?

A. As often as material. Changes are made usually once in six months, and we keep the latest supply on hand and give them freely to navigators who ask for them. By referring to that "light list" you find the latest information relating to the lights which, on that page may appear where that stamp is.

Q. And that is the object of this stamp, is it?

A. Yes, sir.

Q. Do you know whether these words stamped here are
274 contemporaneous with the original issue of the book or are put on there later?

A. That is a correction, sir, put on later.

Mr. BARTLETT: I move to strike out that exhibit on the ground that it appears——

The COURT: No.

By Mr. HUGHES:

Q. This paper which is pasted on the cover of the book, with the date May 4, 1898, and the statement "sailing directions corrected to date of issue"?

The COURT: Hadn't you better frame that question differently?

Q. Will you please explain this paper that is pasted upon the inside cover of the book and state whether it was put there subsequent to the original issue of the book or not?

Mr. BARTLETT: I object to the question as incompetent, improper and calling for an explanation as to the contents of a paper which speaks for itself.

The COURT: That does not call for any contents of the paper. I allow that.

Mr. BARTLETT: I except.

A. This paper that is pasted in here—when it was pasted in I don't know, it may have been prior to May 4, certainly not after, because it is stamped May 4, 1898; this book was originally issued in 1892; this is simply a form that is pasted in here to show the date of issue and also for the owner of this book to enter on the receipt the numbers of notices to mariners that applied for correction in this book, and also to indicate to him when he refers to that book whether he has made the correction on his own chart to conform to the notice.

Q. You know this book was issued long prior to May 4, 1898, don't you?

A. I presume so; in 1892 it was issued——

275 Mr. HUGHES: I will offer in evidence the book which has been marked Libellant's Exhibit 21 for identification.

Mr. BARTLETT: I object to any part of the book except that which refers to this particular neighborhood of the Cuban waters.

The COURT: Mr. Bartlett, you asked the question as to the papers pasted on the cover. If you withdraw that, I will not admit the book as a whole in evidence, but that is necessarily connected with these other questions.

The book is marked Libellant's Exhibit 21, April 24, 1899.

Recross by counsel for respondent.

By Mr. BARTLETT:

Q. When did you ever see a slip like that before?

A. I can't recall when I have seen it, but I have seen it.

Q. Are there any in your office now?

A. No, sir, those are more for the benefit of the merchant marine than they are for our use. We have a different form for the navy on board ship.

Q. You say this could not have been issued after May 4, 1898, this book, because it is stamped "Issued May 4, 1898." Do you mean by that that the stamp mark is infallible as showing the date of issue in any office?

A. From the main office, yes, sir.

Q. Suppose there is an error in the stamp?

A. That may possibly be, but I accept that as officially correct.

Q. You assume it is?

A. I assume it is.

Q. If the later edition was issued the end of April, 1898, why didn't they get that on the 4th of May? Why did the old edition go out in May, 1898, or don't you know?

A. I can't answer why it went out.

Q. You don't know anything about it?

A. I don't know anything about why that went out any more than any other. It was corrected up to that date, and is as good as that one that was issued in April or even in May, if there are no corrections following in May after May 4. That book is corrected up to May 4, and is so stamped.

276 Q. Which book?

A. That book there.

Q. You don't tell us that you know when that was pasted in this book?

A. I did not say I did; it may have been pasted in in April.

Q. All we know is that that book assumes to be correct in 1892?

A. No; it assumes to be correct to May 4, 1898, and I assume it is.

Q. Just because this blank paper is pasted in here with no official certificate?

A. That seal up there is an official seal and may be imitated, but I don't think it is likely that it is imitated.

Q. Couldn't any man who obtained one of these blanks such as are to be found in any library in reference to the library have pasted it in this book?

A. You are asking me a question that I do not understand.

Q. Is there any official certificate there?

A. I consider that an official certificate, yes.

Q. Without any signature?

A. Without any signature.

Q. And without any seal?

A. The seal is there on the top.

Q. It is no more the seal than the stamp on the head of any official paper.

Mr. HUGHES: Hasn't this line of examination been exhausted, your honor?

Q. You have had experience, you say you are familiar with these hydrographic charts?

A. I am familiar with the use of them, I know how to use them; I know how to navigate.

Q. You are familiar with the chart in evidence?

A. I have used that chart.

Q. When was the United States survey made from which that chart was compiled?

A. The United States has made no survey on the coast of Cuba until recently, until after the close of the war. They have two vessels down there now making the survey.

Q. Up to the time these books were issued there never had been a United States survey of the coast of Cuba?

A. I won't say that, because the Spanish government
277 never allowed us to make any survey on the Cuban coast.

Q. Won't you answer my question? I asked you whether there had been or not, not who allowed it.

A. No, sir.

Q. There has been no United States Government survey?

A. Not on Cuba.

Q. Up to the time of the publication of either of them?

A. Not to my knowledge.

Q. Isn't it the fact that these maps and the maps that you have put in evidence are not compiled from any United States data at all?

A. Yes, there are United States data on that—information given by ships of war that visited those parts.
Q. What is the original source?
A. The Spanish surveys and the British surveys.
Q. That is compiled from those two sources?
A. Yes, sir, from such information as they had received from time to time from the commanders of our own ships.
Q. But the original source is the British and Spanish surveys?
A. Yes, sir.
Q. Or, in other words, the British and Spanish charts?
A. Yes, sir.
Q. You don't know anything about this coast yourself, do you?
A. I navigated around there all summer by myself.
Q. Which side?
A. North and south.
Q. Did you have one of those blue books on board?
A. I did.
Q. Which one?
A. I had that one and several others. I had No. 86; I don't remember the dates of them.
Q. Is that of 1892 or 1898?
A. I don't remember the dates; I know I had 86.
Mr. HUGHES: Both are No. 86. The number refers to the fact that it is the Caribbean sea and adjacent waters.

278 WILLIAM L. MOORE, recalled as a witness on his own behalf, testifies:

By Mr. HUGHES:

Q. I show you a paper purporting to be an agreement of suretyship and I call your attention——

Mr. BARTLETT: I object to the witness being asked about the paper unless it is offered in evidence.
The COURT: It will have to be identified.

Q. I show you Exhibit 12 for ident., and I will ask you if you received that paper.
A. This one or one like it.
Q. You are able to say that you received that or a counterpart?
A. Yes, sir.
Q. Now I show you Exhibit 5 for ident.——

Mr. BARTLETT: All this is taken subject to my objection that it is incompetent, improper, and immaterial.

Q. I show you Exhibit 5 for ident., and I produce a paper which purports to be a counterpart and ask you if you received that.

Mr. BARTLETT: I object unless the paper is in evidence.
Mr. HUGHES: Will you admit that this is a counterpart?
Mr. BARTLETT: I don't admit anything.

A. I received a paper exactly like that.

Mr. HUGHES: We offer in evidence the paper shown to the witness.

Mr. BARTLETT: The simplest way would be to ask the witness if he received all these alleged charter-parties and bonds, and he would say yes.

The WITNESS: I am quite sure those are the papers that were delivered to me.

279 Mr. BARTLETT: I object to the witness being examined as to the papers unless they are in evidence.

Mr. HUGHES: One of them is Exhibit 12.

The COURT: I receive that.

Q. I now call your attention to another paper which I show you and I will ask you if you received that?

Mr. BARTLETT: I object to that as incompetent, improper, irrelevant and immaterial.

The WITNESS: That has my mark on it there.

By the COURT:

Q. You did receive that, did you?
A. Yes, sir.

Mr. HUGHES: We offer the paper in evidence. It shows it was executed by the Sun Printing and Publishing Company and is acknowledged before a notary.

The COURT: How did he get it?

By Mr. HUGHES:

Q. You received it from whom?
A. From Mr. Manning.
Q. From Mr. Thomas Manning?
A. Yes, sir.

By the COURT:

Q. When did you receive it?
A. (Referring to the paper.) A day or two after the 14th, after its date.

By Mr. HUGHES:

Q. That is May 14, 1898?
A. Yes, sir.

Mr. BARTLETT: I object to the admission of the paper on the grounds that it is incompetent, improper, irrelevant and immaterial; and on the ground that the respondent is not connected with it in any way.

Q. This is the paper that you received from Thomas Man-
280 ning, as I understand it. Did you receive it at the same time that you received the paper I now show you?

Mr. BARTLETT: What has happened to the other exhibit offered?

A. I received those two papers.

Q. Did you receive this charter-party dated May 14, 1898, and this agreement of suretyship dated May 14, 1898, both from Thomas Manning?

A. Yes, sir.

Q. About what time?

A. I can't remember exactly the date, a few days after that.

Q. A few days after that—May 14, 1898?

A. Yes.

Mr. HUGHES: We now offer in evidence the charter-party and agreement of suretyship which are counterparts, as appears on their face, of Exhibits 4 and 5 for identification.

Mr. BARTLETT: I object to the papers as incompetent, improper, irrelevant and immaterial; and on the ground that they have not been properly proven; and further, that they are in no way connected with the respondent; that the signature has not been proven or the acknowledgment.

The papers are marked Exhibits 4*a* and 5*a* for ident.

Q. With regard to the paper marked Exhibit 12—the agreement of suretyship—at the same time that you received that paper, did you receive the paper I now show you, which is the charter-party of April 1, 1898?

A. Yes, sir.

Q. From whom did you receive that?

A. From Thomas Manning.

Q. Is that charter-party of April 1, 1898, identical with the paper which has been marked Exhibit 3 for ident., omitting the pencil interlineations which I see here?

A. Yes, sir.

Mr. HUGHES: We offer the paper in evidence.

281 Mr. BARTLETT: I object on the same grounds as last stated; and on the further ground that the paper has been mutilated by pencil memoranda.

The paper is marked Libellant's Exhibit 3*a* for ident.

Q. I show you a letter dated April 1, 1898—marked Exhibit 1 of March 15, 1899, in connection with the deposition of Olaf Petersen—and I will ask you if the signature to that letter is in the handwriting of Thomas Manning?

A. I should say it was undoubtedly.

Mr. HUGHES: We ask for the purpose of this record that the testimony of Capt. Atkinson as to the valuation of the yacht *Kanapaha*, and as to the value of other yachts, between pages 70 and 80 of his deposition be stricken out; save only the statement of Capt. Atkinson that a yacht has no market value.

The COURT: I shall strike out nothing from the deposition. I will note that on this hearing no evidence as to damages will be considered, that all such evidence is to be reserved for hereafter.

Mr. HUGHES: We do not ask that it be stricken out of the deposi

tion, but that it be stricken out from this record, the deposition being in one aspect of the case entirely before your honor.

The COURT: I rule that all the evidence in Capt. Atkinson's deposition relating to damages is not considered as received upon this present hearing, but that that evidence and all other evidence on damage is reserved for future consideration in case any decree should be found for the libellant.

Mr. BARTLETT: Evidence as to the condition of the yacht, all that stands of course?

The COURT: Do you mean her seaworthy condition?

Mr. BARTLETT: Her general condition, yes.

282 The COURT: No evidence on the question of damages is considered at this time.

Mr. HUGHES: We understand that that includes the evidence as to the value of the yacht?

The COURT: Of course.

Mr. BARTLETT: I offer in evidence all the minutes of the board of trustees of the Sun for the year 1898.

Mr. HUGHES: We object to their admission as incompetent, immaterial, and as not binding upon the libellant; that the absence of any resolution relative to this transaction in nowise affects the libellant.

Objection overruled. Libellant excepts.

Page 182 of the book of minutes is marked Respondent's Exhibit B, April 24, 1899.

LORING T. HILDRITH, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. HUGHES:

Q. Have you compared Exhibits 3 and 3*a* for ident.?

A. I have.

Q. Will you state whether or not they are identical?

A. They are identical in every way, signatures and contents.

Q. I show you also Exhibits 4 and 4*a* for ident., and ask you if you have compared those?

A. I have.

Q. Are they identical?

A. They are identical with the single exception that in the signature "Thomas Manning" in one there is no designation of him as agent; and in the other there is a designation "Thomas Manning" as "Agent." That is the only difference between the two. The printed part is identical.

By the COURT:

Q. Which is the one that has Mr. Manning's signature without "Agent"?

A. 4*a*.

283 By Mr. HUGHES:

Q. I show you Exhibits 5 and 5*a* for ident.

A. I have examined these and find them identical in every particular.

STEPHEN B. ATKINSON, being duly sworn and examined as a witness for respondent, testifies:

By Mr. BARTLETT:

Q. You are the same Capt. Atkinson—S. B. Atkinson—whose deposition has been taken in this case?
A. Yes, sir.
Q. To what place does the Ward line in this city run?
A. The Ward line runs to Havana and Nassau and Santiago, Cienfuegos and Manzanilla.
Q. Would there be any occasion for an officer employed in the Ward line to go along the old Bahama channel near Nuevitas?
A. No, sir.

Mr. HUGHES: We object to that as irrelevant; that the object appears to be to criticise the testimony of Capt. Knight, whose testimony was that he has acted as pilot all along the north coast of Cuba and has been there for years.
Objection overruled. Libellant excepts.

Q. Would there be any occasion for an officer employed in the Ward line to go along the old Bahama channel near Nuevitas or by the harbor of Nuevitas del Principe?
A. No, sir.
Q. Prior to the accident or the stranding of the *Kanapaha* had you seen any British chart or any chart containing any outline of the reef upon which the vessel was wrecked?

Mr. HUGHES: We object, that all this line of examination has been gone into in the Captain's deposition.

A. Not any.
284 Q. In the testimony of this Mr. Knight (p. 199) he speaks of the reef lying about seven to nine miles from the eastern poin-, about two miles off the eastern point of the entrance to Nuevitas harbor: "Q. Lying seven to nine miles E. N. E.? A. Running parallel with the shore very near." What should be the point of the compass indicated there?

Mr. HUGHES: We object.

Q. How does the reef lie, in what direction as compared with the shore line—the reef upon which the yacht stranded?
A. The direction of the reef? About E. S. E., S. E. by E. or E. S. E., running parallel with the shore.

By the COURT:

Q. Do you know for how long a distance the reef runs?
A. About seven to nine miles, from Eastern point to Point Guanador.
Q. Does that include Nuevitas?
A. That is seven miles to the entrance of Nuevitas; Guanador

point is seven miles from the eastern entrance into Nuevitas harbor, about where the wreck lies.

Q. What is Eastern point?

A. Eastern point is the entrance, or the east side of the entrance into Nuevitas harbor.

By Mr. BARTLETT:

Q. Was that reef indicated on any chart on board the *Kanapaha* at the time of the wreck?

A. It was not.

Mr. HUGHES: We object, that the chart is in evidence and will show for itself.

Q. I ask the broad question, "any chart"?

Mr. HUGHES: We object to that as secondary evidence.

Q. How far is Cape Lucretia from Nuevitas del Principe?

A. Speaking from memory I should judge about 100 miles, about in the neighborhood of that.

285 Q. It seems to have been intimated in the testimony of Capt. Knight that you should have taken bearings on the day of the accident, prior to the accident. Please state why you did not take bearings on that day, if you did not.

A. The reason why I did not take bearings was that I had no well-defined object to take bearings of.

Q. There was no well-defined object from which you could take bearings?

A. From which I could take bearings.

Q. There was no promontory or headland?

A. No, sir; not any headland or promontory that I could distinguish or know that it was on the coast line; it might be two or three miles back from the coast which would be very dangerous to take cross-bearings from and put you in a wrong position. If you have a light-house or any well-defined headland that you are sure of, your cross-bearings or four-point bearings will give you a position very correctly.

Q. This witness would seem to have intimated that certain bearings could be taken off Neuvas Grandes from some little hummocks: "Q. Is there not near Neuvas Grandes some high ground? A. Little hummocks, not extremely high. Q. Enough to enable one to take reckonings? A. Yes, we take bearings there." Do you know the coast of Neuvas Grandes?

A. Do I? No, sir.

Q. Was there any high land anywhere along passed by you in the afternoon from which you could have taken bearings?

A. No, sir.

By the COURT:

Q. About what time was it she struck?

A. About 7.30.

Q. How long was that after sunset?

A. About an hour and twenty minutes, I should judge from memory.

By Mr. BARTLETT:

Q. Fully dark then, was it?
A. Oh, yes; very dark.
Q. It must have been half an hour or an hour after dark?
A. I should think fully an hour after dark or an hour and
286 a quarter; I guess it would be nearer an hour and a half, for I expected to make the light at 6 o'clock.

By the COURT:

Q. Where were you making for?
A. Havana.
Q. Sailing west?
A. Yes, sir; the last course I steered was N. W. by W. through the old Bahama channel.

By Mr. BARTLETT:

Q. This witness Knight was asked, "Q. I will ask you whether in steaming along the north coast of Cuba on a N. W. course to make the old Bahama channel and at the rate of 11 to 12 knots an hour, so that at about half past seven the steamer is found about seven miles east of the Eastern Point light, it would be possible in clear weather, if you were in sight of shore most of the day, to ascertain up to and including sunset the true position of the steamer. A. Yes, sir." Was there anything that you could have done to ascertain the position of the steamer nearer than you did?
A. No, sir; nothing.

Mr. HUGHES: We object.
The COURT: I allow the testimony.

Q. You took every precaution, did you?
A. Yes, sir; always do.
Q. Where was the steamer about half past seven, do you know? How many miles east of the Eastern Point light?
A. About seven miles east; about seven miles to the eastward of East Point light.
Q. An implied criticism of you seems to have been made in the question put to Capt. Knight: "Q. It isn't safe to run for an object when you expect to see it and don't see it, it isn't safe to run your distance up?" Did you run for any light?
A. No, sir.
Q. And were you standing off shore?

Mr. HUGHES: This whole matter was gone over and the witness was cross-examined. It is very difficult to object to these
287 questions intelligently because your honor has not read the deposition. As matter of fact, unless we reopen the whole testimony of this witness all this should be excluded.
The COURT: I can't tell about that now.

28—262

Q. Did you make a report of the loss of the steam yacht *Kanapaha* to the board of inspectors at New Orleans?
A. I did.
Q. Is that a true and correct copy of the report made that I show you, and the whole of such report?
A. Yes, sir.
Q. True and correct?
A. True and correct.
Q. Was it made by the identical typewriter, were they duplicates?
A. It is the same.
Q. It is a duplicate, an original made at the time?
A. Made at the time.
Q. You saw it made?
A. I saw it made; yes, sir.
Q. And you compared them?
A. Yes, sir.
Q. And this is the one filed by you in New Orleans?
A. This is a copy or duplicate of the one filed by me in New Orleans.

Mr. BARTLETT: We offer the report in evidence.
Mr. HUGHES: We object.

Preliminary cross.

By Mr. HUGHES:

Q. Is this your signature?
A. Yes, sir.
Q. When did you first see this paper?
A. In New Orleans.
Q. This paper that I now hand you, is that your signature to that paper?
A. Yes, sir; that is my signature.
Q. Is this the original report?
A. This is the original report made in the St. Charles hotel in New Orleans.
Q. Didn't you file your original report?
A. Yes, sir.
Q. Is this the one you filed?
A. That is a duplicate.
288 Q. Made by whom?
A. By the same parties that made the other.
Q. When was this duplicate made?
A. On or about the last of September, near the last of September; that is the time it was typewritten in New Orleans.
Q. Were you there at the time?
A. I was.
Q. Did you get this at the time?
A. I did; had it in my possession ever since.
Q. Where was it when your deposition was taken?
A. With my effects at that time; I hadn't my effects with me at the time.

Q. Where was that?

A. When I was here before? I think it was in Boston, probably; I don't remember just exactly where they were because I had been traveling a good deal of the time.

Mr. HUGHES: We object to the admission of the paper on the grounds that it is a declaration of the witness not admissible in evidence, that it is not testimony, and that it in no way binds the libellant; also that it is incompetent. Of course the last paper attached here is not offered.

Mr. BARTLETT: We offer the whole.

Mr. HUGHES: We object to it on the same grounds just stated; also that it is a copy of a paper in no way identified; that it is a hearsay statement in no way binding upon the libellant.

The COURT: I exclude both of them. He can testify as to everything that is in the report and can refer to it to refresh his memory.

Q. Refresh your memory by referring to the paper and tell us what you did.

Mr. HUGHES: We examined this witness fully and a great deal he said he did not remember and a great deal he refused to state. Now we object to his reading off from this report and incorporating that in his testimony as though it were his present recollection.

289 We think he should be interrogated as to what he knows about this report, and what he does not know, and on what part he relies upon the paper in order to testify.

The COURT: The objection is perfectly good. The proper way is to allow him to refresh his memory upon any point he does not recollect.

Q. What time did you pass, on the morning of the 5th of September, Cape Lucretia? If you want to refresh your memory, do so.

A. I couldn't give you the time exactly.

Q. (Counsel hands the report to the witness.)

Mr. HUGHES: I want to know whether the witness on looking at that paper means to say that he now recalls, and is prepared from his memory to state, the time.

A. It was some time in the morning of that day of the wreck. (Referring to the report.) "8 a. m., land westward of Cape Lucretia."

Q. Did you change your course at that time?

A. (Referring to the paper.) Yes, sir.

Q. To what?

A. W. by N. ¾ N.

Q. At 5 p. m. that afternoon did you change your course again?

A. (Referring to the paper.) Yes, sir.

Q. In what direction?

A. To N. W. by W.

Q. For what point?

A. For a course parallel to the coast for old Bahama channel, eastern entrance.

Q. Was there a steamer in your rear at that time?

Mr. HUGHES: We object to that as immaterial.

Q. Was there a steamer astern?

A. No, sir; not at that time.

Q. When was there? When did you see the *Albis?*

Mr. HUGHES: We object to that as immaterial.

Objection overruled. Libellant excepts.

A. I saw the steamer that afternoon; I think she hove in sight about 2 o'clock.

By the COURT:

Q. Where was she, astern?

A. No, sir; she was on my starboard beam to the northward.

290 Q. How far away from you, do you think?

A. About seven miles at that time; seven to eight miles.

By Mr. BARTLETT:

Q. How far astern was the *Albis* at the time of the stranding of your boat?

Objected to as immaterial. Objection overruled. Libellant excepts.

A. I should judge about two miles, two to three miles, it being dark I couldn't tell exactly.

By the COURT:

Q. Did you see her lights?

A. Yes, sir.

Q. Was she directly astern or on your quarter?

A. She was directly astern steering the same course as myself.

Q. Did you say about how much you estimated she was astern?

A. I should judge by her lights that she was about two miles astern; two or three miles.

Q. Was she steering the same course that you were at the accident?

A. She was steering exactly the same course at dark that we were going and she continued that course and was in our wake when we grounded.

Q. Did you see both her colored lights?

A. Yes, sir, shortly after we stranded.

Q. How were they just before you stranded?

—. I could see her masthead light all the time and, of course, after we stranded I didn't take notice.

Q. Before you stranded, when you saw her lights, do you remember whether both colored lights were in sight?

A. She was right in our wake; I should say both colored lights

were—both should have been showing; I don't think her lights were ever out of sight.

By Mr. BARTLETT:

Q. After the *Kanapaha* struck, did you signal the *Albus* with lights?

Objected to.

291 By the COURT:

Q. Did she carry range lights?

A. No, sir, only side lights and masthead lights. I fired guns and showed lights.

Q. As soon as you stranded?

A. Yes, sir, to warn the other ship there that was coming astern of me.

By Mr. BARTLETT:

Q. At the time of the accident were you running for any lights?

A. No, sir, I was running for the eastern entrance to the old Bahama channel, a distance from the shore that I judged six miles, which would carry me in sight of Martenillos Point light.

Q. But you were not running for any object such as a light-house?

A. No, sir. A course N. W. by W. laid down on the chart will show you is not even on to the land, it is a course parallel with the shore, which would carry me, if I had been the distance off shore that I calculated, directly into old Bahama channel.

Q. Is the reef upon which the *Kanapaha* struck shown on Exhibit 19?

A. This chart does not show any reef where the *Kanapaha* struck. The wreck lay off Guanda point a mile and three-quarters.

Q. Did you receive a letter from the master of the *Albus?*

A. I did.

Mr. BARTLETT: I offer the letter in evidence.

Objected to as immaterial. Objection sustained.

Q. Did you file a report in writing before the board of inspectors at New Orleans?

A. I did.

Q. Did they inquire of the circumstances of the wrecking of the vessel?

A. There was no official inquiry. They exonerated me.

Mr. HUGHES: We move to strike out the last sentence of the answer.

Motion granted.

Q. What did they do in the matter?

292 Mr. HUGHES: We object to the question as incompetent. Objection sustained.

Mr. BARTLETT: I offer to show that an inquiry was made by the inspectors in New Orleans, that a report in writing was submitted

by Capt. Atkinson, and that such report was deemed satisfactory by the board.

Mr. HUGHES: We object to that as immaterial and incompetent.

Objection sustained. Respondent excepts.

Cross-examined by counsel for libellant.

By Mr. HUGHES:

Q. What light did you expect to see at 6 o'clock?

A. I expected to see Maternillos Point light.

By the COURT:

Q. Is that the light at Nuevitas?

A. Just a little to the westward of the entrance to Nuevitas.

Q. That is the light which was visible seventeen miles, as you said?

A. That is the light.

By Mr. HUGHES:

Q. The *Albis* was bound for Nuevitas, was she not?

A. She was.

Q. Is it not a fact that at 8 o'clock in the morning when off Cape Lucretia you changed your course to W. by N. ½ N. to make Maternillos at Nuevitas?

A. Yes, sir. Just allow me to correct that answer a little—to put me in position to see the light in passing.

Q. Isn't it a fact that you changed your course, as I have stated, to make Maternillos at Nuevitas?

A. Yes, sir, so I could see it while passing.

Q. And didn't you continue on that course from 8 o'clock in the morning until 5 o'clock in the afternoon?

A. I did.

Q. Where were you at 5 o'clock, when you changed your course, 5 in the afternoon?

A. I should suppose I was about 25 miles to the eastward of Maternillos or 30 miles.

293 Q. Did you know at that time where you were?

A. I thought I did.

Q. Where did you think you were at that time?

A. Just where I was shaping my course for, for the old Bahama channel.

Q. Where did you think you were at 5 o'clock in the afternoon when you changed your course?

A. At sea on the north side of Cuba.

Q. Whereabouts at sea on the north side of Cuba?

The WITNESS: Your honor, I think I have sufficiently answered that question.

The COURT: If you have stated it as near as you can, you have.

A. I was east of the entrance of Nuevitas.

By the COURT:

Q. How far from shore did you estimate you were at 5 o'clock?

A. When I changed my course at 5 o'clock I give the course N. W. by W., I calculated that would carry me six miles off.

Q. That is not the question asked. Where you were at 5 o'clock, when you changed, was the question, and you said 25 or 30 miles east of *Maternillos*?

A. About that.

Q. About how far off shore were you at that time?

A. I would be considerably farther off shore there than I would be in passing. I shaped my course to pass outside, six miles outside of Maternillos light. I would have to carry that course back and measure.

Q. Could you see the shore at that time?

A. I could see the land, but I couldn't see the shore to make out anything definite on shore.

By Mr. HUGHES:

Q. To what course did you change at 5?

A. N. W. by W.

Q. Did you continue on that course up to the time of the accident?

A. Yes, sir.

294 Q. I show you on this chart which has been marked Libellant's Exhibit 19, a dotted line off Nuevitas del Principe?

A. Yes, sir.

Q. Extending nearly to the meridian of 77 degrees. Tell me what that dotted line indicates?

A. That dotted line indicates the reef.

Q. Part of the reef upon which the vessel stranded?

A. No, sir, the vessel didn't strand on that reef at all. There was no reef where the vessel stranded. If you allow me to correct you, that is where the vessel stranded (indicating on the chart).

Q. You don't understand my question. There is only one reef there—I don't mean on the chart, but at the place?

A. There is a reef running parallel with the coast on the English chart, you can see it.

Q. I will ask you if this dotted line indicated on this chart—Libellant's Exhibit 19—is not a part of the reef upon which the *Kanapaha* stranded?

A. No, sir, she did not strand there.

Q. That is not the question.

A. A part of the reef, yes, you can put it in that way if you wish.

By the COURT:

Q. The dotted line on Exhibit 19 which part of the reef on which she stranded?

A. It is the part of the reef at the entrance to Nuevitas, about four miles from where the ship stranded.

Q. To the eastward or westward?

A. Westward.

Q. That is the west part of the reef?
A. Yes, sir.
Q. And about four miles to the westward of where the ship stranded?
A. Yes, sir.

By Mr. HUGHES:

Q. At what rate of speed had you been going all that day?
A. 12 knots, 11 to 12 knots according to steam.
Q. Are you not familiar with the fact that the highlands along the coast of Cuba eastward of the Bahama channel enable one to check his reckoning and to keep a proper offing?

295 Mr. BARTLETT: I object to that as a statement of fact not proven and as assuming such was the case.
The COURT: I allow it on cross-examination.

A. No highlands that may be known to a master will enable you to check your position.
Q. I will ask you when, during the day of the accident, you did verify your position with reference to the shore?
A. When I passed Cape Lucretia.
Q. Did you at any time between 8 o'clock in the morning and the time of the accident on the day in question endeavor to verify your position off shore?
A. I did at noon.
Q. Where were you at noon?
A. About Cape Lucretia at noon.
Q. What did you do to verify your position at that time?

By the COURT:

Q. I thought you said at 8 a. m. you were off Cape Lucretia?
A. No, sir, I said I made the land to the westward of Cape Lucretia; I was way to the eastward of Cape Lucretia at that time. I made the land some 30 or 40 miles to the westward of Cape Lucretia—just what I stated in my report.

By Mr. HUGHES:

Q. You said in your direct examination that at 8 o'clock the land westward of Cape Lucretia was about six or seven miles distant. Didn't you intend to be understood that you were off Cape Lucretia about six or seven miles at 8 o'clock the day of the accident?
A. Yes, I thought I was about six miles off shore of Cape Lucretia when I passed there the day of the accident.
Q. And that you were six or seven miles off Cape Lucretia at 8 o'clock in the morning?
A. No, I wasn't up to Cape Lucretia at 8 o'clock in the morning and I don't think I stated so.

Q. Is it your best recollection, and do you mean now to
296 testify that you were off Cape Lucretia at noon and not before?

A. I wouldn't be positive of any particular hour; I was off Cape Lucretia some time about the middle of the day.

Q. Did you then verify your position?

A. I did.

Q. In what manner?

A. By bearings—Cape Lucretia light-house that I knew.

Q. How long was it before you left the vessel after the accident to the yacht *Kanapaha?*

A. Before the vessel was finally abandoned?

Q. Before you left it that night?

A. Before I left it that night? Remember I left it on two or three occasions; I left it in my boat to board that steamer to warn her of her danger; and then I left her again to put my passengers on the *Albis* and I returned again to the ship; I finally abandoned the ship about, I should judge, 2 o'clock in the morning when we got on board the *Albis.*

Q. Did you bring away your log?

A. I did not.

Q. Did you make any effort to save your log?

A. I did not have the log.

Q. Didn't keep a log?

A. No. The mate kept the log.

Q. Did you make any effort to save the log that the mate kept?

A. No, sir, I didn't see it at all. Everything was in confusion.

Q. Who was the mate?

A. A man by the name of Parker.

Q. Did you make any efforts to save your charts?

A. The chart I was using at the time when I wanted it I found it had been blown out on deck and was destroyed, it had blown out of the pilot-house, washed out.

Q. Did you save any of your charts?

A. No, sir.

Q. Did you try to?

A. No. I had plenty of other work to do, I wasn't saving any charts, sir.

Q. After you left Cape Lucretia did you endeavor at any time during the day of the accident to verify your position off shore?

A. I did not, for the reason——

Q. Did you make any observation that day?

Mr. BARTLETT: Let him finish his answer.

297 A. (continued.) For the reason that I had no definite object to get a bearing of.

Q. Did you take any observations on that day?

A. I did not.

Q. Did you take any at noon?

A. No, sir, not observations of the sun—I presume you mean. Do you mean observations of the sun?

Q. I mean to determine your longitude and your latitude.

A. I did not. I determined my latitude and longitude by the

bearings of the land, by the bearings of Cape Lucretia light-house and by my log.

Q. You did not take any observations of the sun?

A. No, I did not.

By the COURT:

Q. How many miles were you off from the light-house?

A. Six miles.

By Mr. HUGHES:

Q. Do you mean to say that between Cape Lucretia and the point which the vessel had reached at the time of the accident there were no headlands or light-houses which would enable you to take your bearings so as to verify your position off shore during the afternoon of that day?

A. For any one who had a good local knowledge of the coast I think there would be; any man who professes to be a pilot knows the headlands and knows whether the headlands or mountains are on the coast or in the interior; if he is able to distinguish between the two he is able to get his place by cross-bearings; but if you don't know you better leave it alone, it is rather a dangerous operation.

Q. At all events you left it alone?

A. I did.

By the COURT:

Q. At sunset could you see the shore?

A. I could see the land, I couldn't see the shore to say or swear it was the shore; the coast line is very low along that part of the coast.

298 Q. No dwellings or huts or anything of that kind scattered along?

A. No, sir, nothing in sight.

By Mr. HUGHES:

Q. You know Point Manati?

A. I know about where it is.

Q. You know there is high land at Point Manati, do you not?

A. Somewhere in that vicinity I think there is some high land, as near as I can remember.

Q. Don't you know that at Point Manati there is an inlet?

A. If I was looking at that chart probably I would know about it.

Q. I will show the chart to you (Exhibit 19) and I call your attention to Point Manati.

A. There is an inlet there.

Q. And highlands there, are there not?

A. It shows highlands there.

Q. Do you mean to say that it would not be possible for you to verify your position off Point Manati?

A. Yes, sir, probably, if that is just as it is represented; but there is highlands all around here not marked on that chart. How

am I going to distinguish between that highland here or there? That simply shows the coast line.

Q. Do you mean to say that with that inlet there and with the highlands on each side of the inlet you couldn't determine your position off Point Manati?

A. I wouldn't be sure of it.

Q. And you didn't endeavor to ascertain your position at that point?

A. No, I did not. Those inlets show very plain here, but you don't see those inlets in passing, you wouldn't know where the inlet is; you can't see the inlet in Nuevitas.

By the COURT:

Q. I understand you to say there are a number of highlands scattered around?

A. Yes, sir.

Q. And you had no means of identifying the inlet?

A. There is no way to identify that highland shown on the chart because there is high land back of it, you know.

299 Mr. HUGHES: I refer your honor to p. 106 of the book marked Libellant's Exhibit 21: "Vessels coming from to windward, after passing through either of the northeast Bahama channels, or along the north sides of Puerto Rico and Haiti, generally keep the Cuba shore aboard, where the remarkable highlands enable them to check their reckoning and keep a proper offing, according to the season."

Testimony closed.

Counsel hereupon sum up the case orally: Mr. Hughes for libellant, Mr. Bartlett for respondent.

NEW YORK, *April 25th*, 1899.

Mr. BARTLETT: If your honor please, I move to reopen the case so far as to permit the respondent to call certain witnesses on the question of authorization or ratification by the corporation of the alleged instruments in controversy.

Mr. HUGHES: We object to the granting of the motion upon the ground that after full proofs have been offered by libellant and after respondent has had full opportunity with all the witnesses accessible he now proposes to present proof which he has failed to do before, libellant having presented his argument, having commented upon the absence of certain testimony and certain suggestions having been made by the court as to the inferences to be drawn from the case as it now stands, and we submit that the case should be deemed closed and that no further testimony should be received.

Objection overruled. Libellant excepts.

300 PAUL DANA, being duly sworn and examined as a witness for the respondent, testifies:

By Mr. BARTLETT:

Q. You are the president of the Sun Printing and Publishing Association?

A. Yes.

Q. And you were elected president of the Sun Printing and Publishing Association on or about October 26, 1897?

A. I believe so.

Q. After the death of your father. And since that time you have been president?

A. Yes.

Q. Throughout the year 1898 you were president of the respondent corporation?

A. Yes.

Q. You were present at the meetings of the board of trustees during the year 1898?

A. President or present, did you say.

Q. Present?

A. Present? I think so.

Q. Did you hear anything about or did you know anything about the execution of any alleged charter-parties or bonds in connection with the yacht *Kanapaha* in the months of April or May, 1898?

A. No.

Mr. HUGHES: We object to that as improper at this stage of the case; and further upon the ground that the witness's knowledge or want of knowledge, in view of the fact that he of all others had full opportunity to ascertain the facts, is not binding upon the libellant; and that the testimony is incompetent and irrelevant.

Objection overruled. Libellant excepts.

Q. Have you ever seen the alleged charter-parties?

Mr. HUGHES: We object that the question is too general.

Objection overruled. Libellant excepts.

A. No.

Q. You have never seen any bonds or agreement of surety-
301 ship in reference to the yacht *Kanapaha* assumed to have been executed by Mr. Chester S. Lord?

Mr. HUGHES: We object on the same ground—that it is not binding on the libellant; that the witness has had full opportunity to examine all such documents.

The COURT: As long as it was not brought before the board I think it is competent to show what the individual members of the board of trustees knew about it, and to show that they did not have knowledge, if that is the fact.

Libellant excepts.

A. No.

Q. Those papers in controversy in this suit were executed in May, 1898——

The COURT: That is on the second charter?

Mr. BARTLETT: That is on the second charter, the first is April, 1898.

Q. At the time of the execution of these papers were any of them submitted to you or shown to you?

Mr. HUGHES: We object on the same grounds, and that there is no evidence that they should have been submitted to the witness, or that any inference contrary to authority can be drawn from his answer.

Objection overruled. Libellant excepts.

A. No.

Q. Were you consulted prior to the execution of these papers or at the time of the execution of these papers by Mr. Chester S. Lord as to the execution of any of these papers?

Mr. HUGHES: We object to that as involving a conclusion in the use of the word "consulted," and on all the other grounds already stated.

The COURT: I allow that as matter of fact.

Libellant excepts.

302 A. No.

Q. Mr. Edward P. Mitchell was first elected trustee of the Sun on May 23, 1898, was he not (handing witness minutes of May 23)?

A. The minutes show he was elected on May 23, 1898.

Q. And he was not trustee of the Sun Printing and Publishing Association prior thereto?

A. No.

Q. Mr. Laffan has sailed for Europe, has he not?

A. I believe so.

By the COURT:

Q. When did he sail?

A. Wednesday.

Q. This last Wednesday, last week?

A. No, Saturday.

Q. Last Saturday?

A. Last Saturday.

Q. That is April 22nd?

A. Yes.

By Mr. BARTLETT:

Q. Did you tell Mr. Lord at any time that he could make or execute any charter-party for the respondent corporation—The Sun Printing and Publishing Association?

Mr. HUGHES: We object, that it does not appear that the witness was in a position to instruct Mr. Lord or that his directions one way or the other would affect the issues of this case; that it is incompetent and irrelevant.

The COURT: I allow the inquiry whether any instructions, and what, if any, were given by the witness to him.

Libellant excepts.

A. No.

By the COURT:

Q. Did you give any instructions on the subject?
A. I did not give any instructions.

By Mr. BARTLETT:

Q. On the subject of charter-parties or bonds?

Mr. HUGHES: We make the same objection.
Objection overruled. Libellant excepts.

303 A. No.

Q. In addition to being president of the corporation you were throughout the year 1898 and after the autumn of 1897, the editor-in-chief of the Sun?

A. Yes.

Q. And as such you had general charge of the paper?

Mr. HUGHES: We object to that as calling for a conclusion, as too general; that the facts as to what the witness did should be asked for.

The COURT: I allow the question.
Libellant excepts.

A. Yes.

Q. Did you at any time tell Mr. Macdaniel to pay the insurance on the policies taken out on the yacht *Kanapaha?*

Mr. HUGHES: We object, that the witness' instructions to Mr. Macdaniel are not material or relevant, or competent to bind the libellant; that it does not appear that he was in a position to give instructions on that subject.
Objection overruled. Libellant excepts.

A. No.

Cross-examined by counsel for libellant.

By Mr. HUGHES:

Q. Were you in the city of New York continuously in April and May, 1898?

A. Yes.

Q. Were you at the office of the Sun daily on business days during April and May, 1898?

A. Yes.

Q. I suppose you had occasion to see Mr. Chester S. Lord from time to time during those months?

A. Yes.

Q. Frequently?

A. Daily.

Q. Daily?

A. Daily.

Q. And many times during the day?

A. No.

Q. Were your offices near by each other in the building?

A. Yes.

Q. How near?

A. In different rooms, two rooms apart.

304 Q. On the same floor?

A. On the same floor.

Q. And he was the managing editor, as I understand it?

A. Yes.

Q. I suppose you were aware that news was being obtained for the Sun in regard to the progress of events in Cuban waters in April and May, 1898?

A. Yes.

Q. I suppose you were aware that reporters of the Sun were watching the movements of the United States fleet at that time, were you not?

A. Yes.

Q. Were you aware that the Sun availed itself of any dispatch-boats for that purpose?

A. In general terms, yes.

Q. From whom did you get that information?

A. I got it from several sources. I have seen the mention in the dispatches.

Q. In the dispatches in the paper?

A. Yes.

Q. Do you read the Sun?

A. Yes.

Q. And you have the motto, "If you see it in the Sun it's so"—have you that motto now?

A. No.

Mr. BARTLETT: I object to that as immaterial and irrelevant.

Q. It is true, isn't it? Did you get your news as to the dispatch-boats which were used by the Sun to obtain information as to the progress of events in Cuban waters from the columns of the Sun alone?

A. No, I think not.

Q. Did you ever hear anything about it from Mr. Lord?

A. Yes.

Q. You talked with him from time to time as to news obtained from Cuba and from reporters of the Sun at Key West and on the dispatch-boats?

A. From time to time, yes.

Q. During April and May, 1898?

A. I presume so.

Q. Did you ever take the trouble to inquire as to the names of any of these dispatch-boats which were used by the Sun?

A. I don't recollect inquiring.

Q. Do you now recall the use of a boat by the name of the *Premier?*

A. Yes.

305 Q. And you knew in the summer of 1898 that that boat was used by the Sun?

A. Yes.

Q. From whom did you get that information?
A. Mr. Lord.
Q. Did you get it from anybody else?
A. I may have heard some of the reporters speak of it.
Q. Did you have anything to do personally with the *Premier?*
A. No.
Q. Did you hear at any time during 1898 of the use of a boat called the *Carbonaro* to get news for the Sun?
A. No.
Q. You never heard of that?
A. I never heard of the *Carbonaro.*
Q. Do you mean to say that you don't know now as matter of fact that that boat was used and that disbursements were made in connection with it?
A. The first time I ever heard the name used I heard Mr. Bartlett speak of it coming upstairs here today.
Q. This morning?
A. Yes.
Q. It is not a surprise to you to know that boats were used by the Sun to obtain information as to events in connection with the war with Spain the names of which you had never heard?
A. No.
Q. Did you ever happen to hear the name of the yacht *Kanapaha* before this trial?
A. Yes.
Q. From whom did you hear it?
A. From the same source, I think.
Q. Do you remember any source except Mr. Lord?
A. I wouldn't—I am not sure of any source. I know that I heard it from Mr. Lord. I think I have heard the reporters mention the name and also seen it in the columns of the Sun.
Q. You have seen it from time to time in the columns of the Sun referred to as the Sun's yacht, haven't you?
A. Yes.
Q. You saw it so during the progress of the war?
A. Yes.
Q. Do you recall when Mr. Lord ever mentioned the yacht *Kanapaha* to you?
A. No.
306 Q. You know Mr. Charles R. Flynn?
A. I have met him.
Q. Isn't he a friend of yours, Mr. Dana?
A. No. When I say friend—I might pass Mr. Flynn in the street today and wouldn't bow; we never had any relation——
Q. If you didn't happen to see him or he you?
A. Possibly if we both saw each other.
Q. Isn't it a matter of fact that you had some conversation with Mr. Flynn relative to the getting of a suitable boat to use in connection with the observation of the movements of the fleet for the purpose of information for the Sun?
A. Is this a question?
Q. Yes.

A. No, I never had.

Q. Never had any such conversation?

A. No.

Q. Do you remember the fact that early in April, 1898, the question of getting information as to the progress of events in Cuban waters and in connection with the war was talked of in the Sun office?

A. I presume it was.

Q. You presume it was. Can you recall with whom the conversation was?

A. I presume I spoke with Mr. Lord about it.

Q. Would he be the man with whom you would naturally speak about it?

A. Yes.

Q. Do you recall what was said about it?

A. No. It was only—I can only recall that if anything was said it was in a very rough way.

Q. You didn't endeavor to take charge of those details yourself, did you?

A. No; no more than I usually do. I have no charge of those details.

Q. When you say you have no charge of those details, to what details do you refer?

A. I mean to say details of methods of obtaining news I do not enter into.

Q. Who has charge of that?

A. Mr. Lord, as a rule.

Q. That would cover the obtaining of news as to the Spanish war, I suppose?

A. Yes.

Q. As to any current events of importance?

A. Yes.

307 Q. Where reporters should go and what means should be taken advantage of to get information, so far as the details were concerned you would not concern yourself about them?

A. No.

Q. And as matter of fact in connection with the Spanish war, did you in any way concern yourself with the details in connection with the use of any dispatch-boat used by the Sun for getting information?

A. No.

Q. Not at all?

A. I don't think so.

Q. Who had charge of that?

A. Mr. Lord, I think.

Q. And you understood, didn't you, as editor-in-chief of the Sun and president of the Sun Company, that Mr. Lord was exerting himself to get news for the Sun regarding the Spanish war?

Mr. BARTLETT: I object to that as incompetent.

Objection overruled. Respondent excepts.

A. I understood Mr. Lord was getting news as he always gets news.
Q. In the ordinary course of his business or employment?
A. Yes.
Q. Can you recall whether you ever asked of Mr. Lord what arrangements he was making in regard to obtaining facilities for the reporters of the Sun in their observations of events in connection with the Spanish war?
A. I don't remember any such question.
Q. You don't recall making any inquiry about it?
A. I may have said, "Are your arrangements satisfactory?" something of that sort, in some general terms.
Q. You mean, "Are your arrangements satisfactory" to him?
A. To him, yes.
Q. If they were satisfactory to him they were satisfactory to you?
A. Yes.
Q. You left those matters to him?
A. Yes.
Q. And that was well understood in the Sun office?
A. Yes.
Q. And by the other trustees?
A. I presume so.
Q. I suppose you had occasion to familiarize yourself with the details connected with the acquisition of news perhaps more than any other trustee, didn't you?
A. Yes.
308 Q. And yet you didn't attempt to go into the details of the editorial work in obtaining news?
A. No.
Q. I mean of the work of the editorial department in charge of the managing editor?
A. No.
Q. I suppose you were aware at this time that accounts were kept by the Sun of its disbursements?
A. Yes, as in general.
Q. Who generally had charge of the financial matters of the Sun?
A. The book-keeper.
Q. He would be, of course, under somebody's supervision, I suppose?
A. Yes.
Q. Who of the trustees, for example, what officer or person connected with the board?
A. I don't know that there is any trustee specifically designated for that.
Q. Mr. Laffan had something to do with it?
A. Mr. Laffan, I presume, was closer to the transactions of the book-keeping department than other trustees, as I was generally closer to the transactions of the news-getting.
Q. You were aware, I suppose, that there was kept in the Sun's books an account headed "Editorial expense," in which from time to time there were entered items of disbursements made in connection with the acquisition of news for the Sun? Did you know that?

A. I don't know whether that is called "Editorial expense" or what the heading of it is.

Q. Have you looked to see?

A. I don't recall ever seeing such.

Q. You left the book-keeping to the book-keeper's department, did you?

A. It was in Mr. Lord's hands.

Q. And he had charge of the expenses of the editorial department that were entered in the "Editorial expense" account?

A. No, not the editorial; at least, I don't think so.

Q. I am now speaking of the "Editorial expense" account, all expenses incident to the acquisition of news. Did you have occasion to examine into the moneys paid out for this purpose?

A. No.

309 Q. Did you, at any time, during 1898, or do you now investigate these items personally?

A. I think I may occasionally, I don't recollect; not systematically.

Q. But you don't make a business of keeping yourself informed?

A. No. As long as the accounts seem the same degree of expenditures, I have no reason to suppose there is anything extraordinary.

Q. And that matter of the accounts in connection with the acquisition of news is left to whom?

A. The same parties.

Q. That is to whom?

A. Mr. Lord and the book-keeper.

Q. Did you happen to know that there was an account kept during the period of the Spanish war called the "Spanish war account" in the Sun's books?

A. No.

Q. And did you attempt to familiarize yourself with the details of the accounts of the disbursements incident to getting news as to the war?

A. No. All that I know of the account is it was treated as ordinary accounts; that is all.

Q. That is, all the matters pertaining to the getting of news as to the Spanish war were in accordance with the ordinary course of business?

A. Yes.

Q. And left to the department of which Mr. Lord was the head?

A. Yes.

Q. What do you do in connection with the Sun, particularly?

A. I direct its policy, its political policy.

Q. And write editorials, I suppose, from time to time?

A. Yes.

Q. But so far as the active management of the business of the Sun in connection with the getting of news to print and the seeing that it is put in the always-readable manner in which it does appear in the Sun, you don't take charge of that directly, do you?

A. To a very slight degree.

Q. What, if ever anything, did you ask Mr. Lord in regard to his getting any boats to get information as to events in Cuban waters?

A. I don't recollect asking him anything specifically be-
310 yond the general question which I may have asked him once or may have asked him twice as to how——

Q. When do you recall anything you have asked him?

A. I don't recall anything.

Q. What is the general question you had in mind in your last answer?

A. I think I asked him once or twice, "Are you getting on well? Is your service satisfactory?"

Q. What service satisfactory?

A. The news service.

Q. And in what particular?

A. In the distribution of the men and in their methods of transportation.

Q. And in their use of boats?

A. Generally in the use of boats.

Q. You knew boats were being used by the Sun, despatch-boats?

A. Yes.

Q. As you have said?

A. Yes.

Q. Did you ever ask Mr. Lord for information as to the terms upon which he gotten these boats?

A. No, I presumed he got them on the terms he usually gets his things.

Q. You never made any inquiry as to the terms?

A. No.

Q. And that was entirely left to him, as I understand it?

A. Yes.

Q. It appears that $10,000 was paid to the owner of the yacht *Kanapaha* out of the funds of the Sun on May 14, 1898. Did you make any inquiry with regard to that?

A. I had no knowledge of its payment; it never came to me.

Q. You knew that large payments had to be paid out to provide facilities for the getting of news, didn't you?

A. I presume so.

Q. And that matter, like the others that you referred to, was left to Mr. Lord?

A. Yes.

Q. You had complete confidence in Mr. Lord, didn't you, Mr. Dana?

Mr. BARTLETT: I object to that as incompetent, improper, irrelevant and immaterial, and as not binding upon the corporation.

311 The COURT: There is nothing to indicate the contrary. The witness says matters were left to him. I sustain the objection.

Libellant excepts.

Q. During all the months of April and May, 1898, when, as you

have testified, you were constantly in daily association with Mr. Lord, did you ever ask him how much money he was spending or using in connection with getting news about the progress of the Spanish war?

A. No.

Q. Did you ever ask him what he was paying for any boat that he got in connection with the Spanish war?

A. No.

Q. Did you ever ask him what boats he had obtained?

A. No.

Q. Or from whom he had obtained them?

A. No.

Q. Did you ever ask to look at any papers or ask him whether he had executed any papers to get any of those boats?

A. No. He had boats; we had boats before.

Q. Had you had boats before?

A. Yes; on races and things of that sort.

Q. That is, the international yacht races?

A. Yes.

Q. Boats had been obtained for reporters?

A. Yes.

Q. Have you had other occasions on which boats have been obtained?

A. I don't know.

Q. I suppose that whenever a boat would be desirable to get news you would expect a boat to be obtained?

A. Yes.

Q. And that would be just as much a part of Mr. Lord's duties as to send a reporter to get information of some events in town?

Mr. BARTLETT: I object.

A. Yes.

Q. He was supposed to get the news, wasn't he?

Objected to. Objection overruled.

A. Yes.

312 By the COURT:

Q. These previous boats that you got, as you say, for the races, were obtained through whom?

A. I don't know that. I have never——

By Mr. BARTLETT:

Q. They were hired by the day, were they not?

A. I think they have been hired for a week; I don't know.

By the COURT:

Q. In those cases who obtained them, who hired them?

A. The same party—Mr. Lord.

Q. How long has Mr. Lord been with you?

A. Oh, 20 years.

Q. How long has Mr. Lord had charge of this department of obtaining the news?

A. The same time.

Q. All that time?

A. Yes.

By Mr. HUGHES:

Q. You recall the fact that committees from time to time examined the books of the Sun and reported to the board of trustees, do you not?

A. Yes.

Q. And that after that time you had an auditor instead of an examining committee?

A. Yes.

Q. And that he reported?

A. Yes.

Q. And during the year 1898, as I understand it, the report was made to Mr. Laffan and Mr. Laffan reported to the board?

A. In the matter of auditing?

Q. I understand an auditor reported to Mr. Laffan and Mr. Laffan reported to the board?

A. I don't know how long the auditor has been in power.

Q. At least reports were made during 1898 from time to time?

A. I don't know that as to whether the auditor reported to Mr. Laffan.

Q. I mean as to the reports made to the board during 1898; you remember as a fact that reports as to an examination of the books and their being found correct, were made from time to time?

A. By the auditor?

Q. By some one of the board when you were present?

A. Yes, the board has been reported to; I forgot exactly by whom.

313 Q. You kept a sort of general lookout as to the amount of expenses in Mr. Lord's department, didn't you?

A. Very vaguely.

Q. You had some idea about the amount of money he was spending to get news, didn't you?

A. I think so.

Q. Or has he been with you so long that you left that substantially to him, knowing he would do what was right?

A. I think I have a record every week of certain expenses. I don't think—I don't know that extraordinary expenses would be put down. I cannot answer satisfactorily that question.

Q. My point was, that you had a general idea as to the amount of money that was being spent to get news?

A. As a rule, yes.

Q. You kept yourself sufficiently informed to know that no extravagant outlay was being made or improper outlay?

A. I should think so.

Q. And that was true all through the year 1898 as well as other years, was it not?

A. I presume so.

Q. Your meetings of the board of trustees were held once a month, I believe?

A. Yes.

Q. How long in duration were they, as a rule?

A. How long were the meetings? Very short, as a rule.

Q. 10 or 15 minutes?

A. Yes.

Q. Seldom longer?

A. Not often longer.

Q. At the meetings of the board of trustees you did not take up the question as to what should be done to get news?

A. No.

Q. Matters of that sort were not brought before the board but were left to Mr. Lord, I suppose?

A. Yes.

Redirect by counsel for respondents.

By Mr. BARTLETT:

Q. In all these years with which you have been connected with the Sun do you know of any charter-party or instrument in writing for the hiring of a vessel, other than those of the controversy in this suit, to have been executed by Mr. Lord or by any one on behalf of the Sun?

314 Mr. HUGHES: We object on the ground that the witness shows he had no knowledge.

Objection overruled. Libellant excepts.

A. Anything made by the corporation?

Q. (Read to the witness.) In all these years with which you have been connected with the Sun do you know of any charter-party or instrument in writing for the hiring of a vessel other than those of the controversy in this suit, to have been executed by Mr. Lord or by any one on behalf of the Sun?

A. No.

Q. Any item of $75,000 paid out for news would not attract your attention, I suppose?

Mr. HUGHES: We object that there is no evidence of any item to that amount being paid out.

The COURT: I disallow that question. There has been no testimony to that effect.

Q. Did you tell Mr. Macdaniel at any time to pay premiums on insurance on this yacht *Kanapaha?*

Mr. HUGHES: We renew our objection on the same ground as heretofore stated.

The COURT: I allow the question.

Libellant excepts.

A. No.

By Mr. HUGHES:

Q. Do you recall any case in which you have given Mr. Macdaniel instructions to draw a check for any expense in connection with the acquisition of news?

A. No.

Q. That is a matter with which you don't concern yourself?

A. With the ordinary run of the office in that way I don't concern myself.

By the COURT:

Q. In the course of business does Mr. Macdaniel draw the body of the checks—is that the custom of the business—while others sign them?

A. I think so, yes.

315 Q. Is it your habit to sign checks?

A. I sign most of them.

Q. Do you give directions for drawing the checks?

A. No.

Q. Who is it gives the instructions to draw checks?

A. I imagine checks are drawn against the accounts rendered by the managing editor, for example, Mr. Lord—by Mr. Lord.

Q. Does Mr. Lord give the orders for all checks drawn on account of the Sun?

A. Oh, no; the publisher, the business manager.

Q. He might give them. Do you mean they are given by different heads of departments; is that it?

A. Yes. I will say, for instance, if there is a check for paper, that would be subject to the publisher, because that for paper is a contract; the record of the paper used is kept and the bills submitted by the paper-makers are reviewed by the book-keeper or by the publisher who made the contract.

Q. Do you mean your publisher?

A. Yes.

Q. Who would give directions to draw a check for paper?

A. If there were any directions necessary—I presume the check would be drawn without question as the reports came in, as the bills came in, in the regular routine of the business.

Q. Who examines to know whether it be regular or not?

A. I presume the publisher does.

Q. Who is your publisher?

A. Mr. Laffan, the business manager.

Q. And checks incurred on account of getting news, when those were wanted, who instructs to draw them?

A. Mr. Lord.

Q. How do you draw the line between the business manager and expenses attending getting news?

A. The managing editor manages the news business, and the material used in the production of the paper—such as paper, ink and type—would be a matter for the publisher.

Q. Who determines the amount of money that shall be devoted to one department or another?

316 A. The managing editor; he, within reason, is supposed to incur bills for news. If those bills were extraordinary it might be that he would be challenged for it. If anything was brought to the attention of the trustees, for example, that was extraordinary, there would be a review.

Q. What in my mind is a little indistinct is the line by which you would divide the business manager from the news manager who would necessarily incur, or might incur under the arrangement you speak of, pretty heavy expenses for news. At the same time it is so closely related to the general business management of the Sun that one might seriously clash with the other, possibly?

A. The bills for news theoretically, of course, are subject to the eye of the business manager.

Q. That would be Mr. Laffan?

A. Mr. Laffan, yes.

Q. He might interfere if he wanted to?

A. He might come and speak to me about it if there was anything extraordinary.

Q. The reporting system is under the direction of the news manager, Mr. Lord?

A. Of the news manager, Mr. Lord—the obtainment of news.

Q. And the salaries?

A. They have their salaries.

Q. And the number of persons to be employed and how distributed, all that belongs to Mr. Lord?

A. Within reason, at his discretion.

Q. Suppose a bill for insurance on this *Kanapaha*, for example, had in some way been addressed to you personally and you had opened the letter and found there was a bill for insuring the *Kanapaha*. What would you have naturally done with that?

A. I think I naturally would have investigated it and found out something about it.

Q. What course would that bill have taken in the office?

A. I think that Mr. Lord would have submitted his record of expenditures and amounts due to the book-keeper.

Q. I said suppose that had come to you personally as the chief of the Sun?

A. It did not come to me.

317 Q. I said suppose such a letter had come—take that case—what would have been the course of that bill; what direction would you have given it?

A. After I found it out?

Q. Yes.

A. If there was anything extraordinary turned up I might go and investigate and ask Mr. Lord about it.

Q. You would have gone to Mr. Lord for the explanation?

A. I presume I would have gone to Mr. Lord for the explanation, yes.

By Mr. BARTLETT:

Q. Was Mr. Lord authorized by you at any time to make written contracts which might subject the Sun to the payment of $75,000?

Mr. HUGHES: We object to that as leading, as calling for a conclusion, and as incompetent.

The COURT: I take it that means a direct authorization in some way, that that is what the question means.

Mr. BARTLETT: Yes, sir.

The COURT: I allow it.

Mr. HUGHES: We object to that on the ground that is leading, as calling for a conclusion of the witness as to what constitutes direct authority instead of calling for what was said and done, if anything, between him and Mr. Lord, and that it is incompetent.

Objection overruled.

Libellant excepts.

A. No.

Q. You didn't know if Mr. Lord hired any boats for the use of the Sun, that Mr. Lord was going to insure the boats so that the Sun would be liable for the loss of the boats, did you?

Mr. HUGHES: We object to that question as leading, and as improper in form.

The COURT: I have allowed all questions to be asked as to Mr. Dana's knowledge of any particular thing. I think he has
318 already said he did not know about this charter; never saw it and was not acquainted with the terms of it.

By the COURT:

Q. Were you acquainted with any of the terms of the charter upon which the *Kanapaha* was obtained for service of the Sun?

Mr. HUGHES: We except on the ground that the question is incompetent and irrelevant; and on the grouud that the witness' knowledge is not pertinent to the issue.

A. No knowledge.

By Mr. BARTLETT:

Q. Is Mr. Chester S. Lord a stockholder or trustee of the Sun Printing and Publishing Association, or was he such stockholder or trustee at any time during the year 1898?

Mr. HUGHES: We object to the question as incompetent, irrelevant and immaterial; that the question here should be as to this agency.

Objection overruled.

Libellant excepts.

A. No.

Recross by counsel for libellant.

By Mr. HUGHES:

Q. You were asked, I think, how many years Mr. Lord had been managing editor, not simply connected with the Sun, but managing editor. Will you state again?

A. I think I said twenty years.

Q. In that capacity?

A. Some long time.

Q. With the same duties and powers that you have described during that whole period?

A. Yes.

By the COURT:

Q. About what is Mr. Lord's age?

A. He is about 48, or 49, or 50.

319 Redirect by counsel for respondent.

By Mr. BARTLETT:

Q. Did you ever know of Mr. Lord prior to this occasion having made, or of his making, any instruments in writing alleged to be in behalf of the Sun Printing and Publishing Association, or in the name of the Sun Printing and Publishing Association?

Mr. HUGHES: We object, on the ground that on the facts disclosed the witness' knowledge or want of knowledge as to that is not pertinent to the issue here.

Objection overruled. Libellant excepts.

A. No.

By the COURT:

Q. You have never known of Mr. Lord's executing any written instruments binding the Sun?

A. No written instruments.

Q. Are there never any written contracts with reporters or persons employed in the editor's department or the news department?

A. I think not.

By Mr. BARTLETT:

Q. Nearly all are oral?

A. Nearly all.

Q. And the salaries are fixed orally?

A. And the salaries are fixed orally.

Q. Either by you or by Mr. Lord?

A. Either by me or by Mr. Lord.

Q. And the large salaries are fixed by you?

Mr. HUGHES: We object to that, calling for a conclusion, as leading, and as improper in form.

The COURT: I sustain the objection as leading.

Q. Are the large salaries fixed by you or not?

Mr. HUGHES: We object to the question as improper in form, that what is meant by "large salaries" should be mentioned.

Objection overruled. Libellant excepts.

320 A. Yes.

Q. Are you either individually or as trustee the largest stockholder in the Sun?

Mr. HUGHES: We object to that as incompetent, immaterial and irrelevant.

The COURT: I exclude the question.

By the COURT:

Q. You are a stockholder, of course?

A. Yes, sir.

Q. All the trustees are stockholders, aren't they?

A. Must be.

Recross by counsel for libellant.

By Mr. HUGHES:

Q. Is Chester S. Lord still employed by the Sun as managing editor?

A. Yes.

Q. He is now in the city of New York?

A. I believe so.

Q. And has been there continuously for the last two or three weeks?

A. Yes.

Q. Do you mean to be understood as saying, Mr. Dana, that you have personal knowledge as to what written contracts Mr. Lord may or may not have made in the course of the management of his department?

A. Would such a contract come before me?

Q. No, that is not what I am asking. I ask you if you mean to be understood as saying that you have personal knowledge as to what contracts in writing Mr. Lord may or may not have made in the course of his employment during the last few years.

A. I have the impression that I have.

Q. Do you confer with him in regard to that?

A. In regard to making contracts? I have never known him to make a contract.

Q. Do you mean that you have never talked together about the subject?

A. It has not been the habit of the office that he should make a contract except such as I have testified to.

Q. How do you know if you don't inquire?

A. It is the understanding.

321 Mr. BARTLETT: We have proved that Mr. Mitchell was not a director at this time, and I suppose that is sufficient.

LEONARD O. MACDANIEL, recalled for the respondent, testifies:

By Mr. BARTLETT:

Q. Tell us how you came to pay the premiums on the insurance on the yacht *Kanapaha*, if you paid them.

Mr. HUGHES: We object, on the ground that this witness has already been fully examined on the subject.

The COURT: I will allow the answer.

Libellant excepts.

Q. Who sent the bills to you?

A. I received the authorized bill from Mr. Lord, authorized in his handwriting.

Q. You didn't know anything about the circumstances when you paid it?

A. No.

Q. You didn't know anything about any liability for insurance?

A. No.

Q. Were you instructed by any officer or trustee of the Sun Printing and Publishing Association to pay these premiums on that insurance?

A. No, sir.

Q. You mean you had no special instructions about paying?

A. Yes, sir.

By Mr. HUGHES:

Q. You had none not to pay?

A. My general instructions are to honor Mr. Lord's orders in writing.

By Mr. BARTLETT:

Q. You just paid them because the bills were sent up?

A. Yes, sir.

Q. And you would have paid any bills O K'd by Mr. Lord?

A. Yes, sir.

322 Q. You would not have inquired into them?

A. No, sir.

By the COURT:

Q. Did you have any conversation with Mr. Lord about these particular bills for insurance?

A. No, sir. I should amend that; the first bill was authorized by him in writing; the two second bills were authorized by him verbally, and I put his name on them per myself.

Q. Did those bills state the length of time the insurance was to run?

A. They are in evidence. I think they do.

Q. Did they state when the insurance expired?

Mr. HUGHES: The first one states two months from April 2d, 1898. The second one states that it is from June 2d, 1898, to August 2d,

1898. The third one states that it is from August 2d, 1898, for one month.

The COURT: For what vessel?

Mr. HUGHES: The yacht *Kanapaha.* And the bill is to "the Sun Printing and Publishing Association to Chubb & Son, Dr.," and we have a letter from Mr. Macdaniel to Chubb in regard to it under date of July 12th.

By Mr. BARTLETT:

Q. At whose request did you write the letter just referred to?

A. Upon Mr. Lord's request, after conversation with him.

Q. Did any one else speak to you about writing this letter other than Mr. Lord?

A. No, sir.

Q. You were not instructed by any officer or trustee of the respondent to write this letter?

A. I have no recollection. I do not recollect his speaking of it.

Q. Mr. Lord?

A. Yes, sir.

By the COURT:

Q. When you sent it I presume the pencil marks in the
323 left-hand corner below were not on it?

A. No, sir.

Q. Was this received back by you in some way?

A. —, sir; an answer, Chubb's own letter.

Q. In whose handwriting are these pencil marks?

A. That I do not know.

Q. Was not this letter returned to you?

A. No, sir.

Q. Do you know how this letter came to be produced on this trial?

A. I saw it come up when Mr. Chubb was on the stand.

Q. You don't know whose handwriting this is in pencil?

A. No, sir.

Q. Do you know Mr. Chubb's handwriting?

A. He wrote in typewriter.

Q. Have you the answer?

A. I had the answer, but I destroyed it as it seemed of no further use at the time.

Q. Will you read that pencil memorandum in the corner and state what your recollection is as to the nature of the reply that you received to this letter?

Mr. BARTLETT: I except to the words "as to the nature."

Q. Do you remember the words of the letter?

A. I do, in effect.

Q. What was it?

A. They were to the effect the same as what is written here.

By Mr. HUGHES:

Q. In blue pencil?

A. In blue pencil.

By the COURT:

Q. Then you can read that pencil memorandum?

A. (Reading:) "Can't be cancelled to advantage as there is no return if you expect to use." "Return" there means "return premium."

By Mr. HUGHES:

Q. I understand that this letter that has been referred to—Libellant's Exhibit 14—omitting this blue-pencil memorandum upon it, is in your handwriting?

A. Yes, sir.

324 By Mr. BARTLETT:

Q. You had charge of the books of the Sun, did you?

A. I did.

Q. And the entries were made by you according to your judgment?

A. They were.

Q. And without being submitted to any of the officers or trustees of the Sun?

A. Yes, sir.

Q. The method of book-keeping and the grouping of items was entirely your own?

A. The grouping of items is my own. The method of book-keeping is the common, regular method of book-keeping; there is but one book-keeping method.

Q. You used your own judgment about the grouping of items?

A. Exactly.

Q. And certain expenditures in the business management of the paper were made by order of Mr. Laffan?

A. Yes, sir.

Q. And certain expenses connected with the news of the paper were made by order of Mr. Laffan, is that so?

A. That is so.

Q. Connected with the Laffan bureau for acquiring news, isn't it?

A. I don't know.

Q. News is acquired and sold through the Laffan bureau?

A. News is sold through the Laffan bureau; I don't know as to its acquisition.

Q. Certain payments are made by order of Mr. Laffan?

A. They are.

Q. Isn't it the fact that Mr. Lord sends downstairs to you a list of persons to whom payments are to be made on account of editorial salaries or for sending news to the paper?

A. Yes, sir.

Q. And those payments in the city of New York are made in little envelopes in cash?

A. Yes, sir; in the city of New York.

Q. And that larger sums or sums to be sent out of town are made by check?

A. Yes; out of town.

Q. And you assumed the item that was sent down by Mr. Lord to be correct without any inquiry?

A. Yes, sir.

325 Q. And without submitting any of the items to any of the trustees or officers?

A. Yes, sir.

By Mr. HUGHES:

Q. And the course of business you have just testified to has been such for many years, has it not?

A. I inherited it.

Q. And when did you come into your inheritance?

A. About ten years ago.

Q. And it has been so since?

A. With some modifications.

Q. Substantially as you have stated?

A. Substantially as I have stated; yes, sir.

FRANKLIN BARTLETT, being duly sworn and examined as a witness for the respondent, testifies:

The WITNESS: I am one of the trustees for The Sun Printing and Publishing Association, the respondent corporation, and was such trustee for the year 1898. I never knew anything about these alleged charter-parties or alleged agreements of suretyship and never heard anything about them until after the wreck of the vessel. The papers were never submitted to me, although contracts in writing on behalf of the corporation have often been submitted to me for years past.

Mr. HUGHES: If your honor please, this testimony is all taken under the same objection as previously offered, that any knowledge or lack of knowledge on the part of the witness as to these matters is not pertinent to the issue here, and we except to its admission.

Cross-examined by counsel for libellant.

By Mr. HUGHES:

Q. Were you a reader of the Sun during the spring and summer of 1898?

326 A. I have been a reader of the Sun for many years. I knew nothing whatsoever about the chartering or alleged chartering of the yacht *Kanapaha*.

By the COURT:

Q. Did you know nothing about the hiring or using of the *Kanapaha*?

A. No, sir.

Q. Or either of the other boats?

A. No, sir; knew nothing about it.

By Mr. HUGHES:

Q. Did you read the Sun in the spring and summer of 1898?

A. I cannot say that I read every word in every copy, but I read the Sun habitually.

Q. Do you take the Sun and read it?

A. I take it whenever I can get it.

Q. Did you know the Sun had reporters in Cuban waters?

A. Not of my own knowledge.

Q. Did you ever take the trouble to inquire?

A. No; I didn't do anything about it. I am counsel for the Sun; I take no active part in its business management except to give my opinion on instruments in writing to be executed by the corporation, which are submitted to me, to attend to its law business and to attend the meetings of the board of trustees and vote on such questions as come up for submission. I was formerly one of the examining board of the accounts and the system was simply for the board to report at a meeting——

Counsel for libellant objects to the testimony.

—and nothing was said either affirmatively or negatively; and so as to the report of the auditor since, it is merely stated. Formerly when Mr. Hitchcock and I were the examining board, Mr. Hitchcock would say, "The examining committee reports that they have examined the books up to — day and have found them to be correct," and then no one said anything and we passed on to the transaction of other business.

By the COURT:

327 Q. That was understood to be acquiescence unless objection was made, was it not?

A. I should think it would be expected to be non-action.

Q. Silence gives consent.

A. That is a question. I don't suppose it was to be an authorization of every item contained in the books.

Q. Did you ever know any item to be investigated?

A. No, sir; never.

Q. Did you ever know any item to be disapproved?

A. No, sir; never knew any discussion as to the items anyway.

By Mr. HUGHES:

Q. Did you inquire of any one what dispatch boats the Sun had during the Spanish war for the acquisition of news?

A. No, I knew nothing about it.

Q. And you didn't inquire?

A. Certainly not.

Q. Did you ever ask upon what terms the Sun was getting news of the events connected with the Spanish war?

A. No.

Q. Did you ever have any conversation with any of the trustees or with the managing editor with regard to the terms upon which the Sun obtained facilities to ascertain the progress of events during the Spanish war?

A. I have had some conversation since this controversy.

Q. I mean before this controversy arose.

A. No.

Mr. BARTLETT: It is admitted that Mr. Mitchell was not a trustee at this time, is it not?

Mr. HUGHES: It has been proved that he was elected a trustee on May 23d, so that he was a trustee during a large part of this period, but he was not a trustee, as I understand it, before that date. Did he have anything to do with the business, Mr. Bartlett?

MR. BARTLETT: No. He was just upstairs in the editorial room.

Testimony closed.

The oral argument for the respondent is resumed by Mr. Bartlett.

328 LIBELLANT'S EXHIBIT 1.

(Cancelled revenue stamp, 5 cents.)

We the undersigned desiring to form a company for the purpose hereinafter mentioned, under the authority and in pursuance of the act of the legislature of the State of New York entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, 1848, and the act or acts amendatory thereof or in addition thereto, and to accomplish the formation of such company do make, sign and acknowledge this certificate; and we do hereby state,

First. That the corporate name of said company is, "The Evening Telegraph Association."

Second. That the objects for which said company is formed are the printing and publishing of a daily newspaper in the city of New York, and generally the business of printing and publishing books, pamphlets and newspapers.

Third. That the capital stock of said company is two hundred thousand dollars, consisting of two hundred shares of one thousand dollars each.

Fourth. That the term of the existence of said company is to be fifty years.

Fifth. That the number of trustees of said company is eight, and the names of the truestees who shall manage the concerns of said company for the first year are Charles A. Dana, Francis A. Palmer, Timothy G. Churchill, Marshall B. Blake, Frederick A. Conkling, Peter McMartin, William T. Blodgett, John H. Sherwood.

Sixth. That the operations of said company are to be carried on in the city and county and State of New York.

329 In witness whereof we have hereunto set or hands and seals the twenty-seventh day of September in the year one thousand eight hundred and sixty-seven.

CHARLES A. DANA. [SEAL.]
F. A. PALMER. [SEAL.]
TIM. G. CHURCHILL. [SEAL.]
MARSHALL B. BLAKE. [SEAL.]
F. A. CONKLING. [SEAL.]
P. McMARTIN. [SEAL.]
WILLIAM T. BLODGETT. [SEAL.]
JOHN H. SHERWOOD. [SEAL.]

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On the twenty-seventh day of September, one thousand eight hundred and sixty-seven, before me personally came Charles A. Dana, Francis A. Palmer, Timothy G. Churchill, Marshall B. Blake, Frederick A. Conkling, William T. Blodgett, and John H. Sherwood, and on the twenty-eighth day of September, one thousand eight hundred and sixty-seven, before me personally came Peter McMartin, all known to me to be the individuals described in and who executed the foregoing certificate, and acknowledged to me that they executed the same.

B. F. LEE, JR.,
Notary Public.

(Cancelled revenue stamp, 5 cents.)

(Endorsed:) Certificate of incorporation of the Evening Telegraph Association. Filed Sept. 30, 1867. Erastus Clark, deputy sec'y of state.

330 STATE OF NEW YORK,
Office of the Secretary of State, } *ss:*

I have compared the preceding with the original certificate of incorporation of the Evening Telegraph Association, filed and recorded in this office on the 30th day of September, 1867, and do hereby certify the same to be a correct transcript therefrom and of the whole of said original.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this 7th day of November, one thousand eight hundred and ninety-eight.

[SEAL.]

—— DAVIDSON,
Deputy Secretary of State.

331 LIBELLANT'S EXHIBIT 2.

CHAP. 4.

An act to change the name of "The Evening Telegraph Association."

Passed January 24, 1868.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The name of the Evening Telegraph Association, a corporation duly created and organized under the authority and in pursuance of the act of the legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, one thousand eight hundred and forty-eight, and the act or acts amendatory thereof or in addition thereto, and located in the city of New York, is hereby changed to, and said corporation shall hereafter be known as the "Sun Printing and Publish-

ing Association;" but all contracts and liabilities made or incurred by the said "Evening Telegraph Association" shall be and remain in force against the said corporation by the name hereby given to it.

§ 2. This act shall take effect immediately.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and the whole of said original law.

Given under my hand and the seal of office of the secretary of state, at the city of Albany, this 2d day of November, in the year one thousand eight hundred and ninety eight.

—— DAVIDSON,
Deputy Secretary of State.

[SEAL.]

332 LIBELLANT'S EXHIBIT 3.

Memorandum of agreement made and entered into this first day of April, 1898, by and between William L. Moore of the city of New York, by Thomas Manning his agent, party of the first part, hereinafter called the owner, and Chester S. Lord of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore being the owner of the steam yacht *Kanapaha* enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of two months from this date expiring on the first of June now next ensuing for the sum of five thousand dollars ($5,000.00), payable on the signing of this agreement.

That the owner hereby agrees to deliver the said yacht in Manning's basin in South Brooklyn to the hirer or his representative as it now is and with all its gear, tackle, and furnishings as they now are.

That the hirer will overhaul and repair and put said yacht in commission at his own expense and from now on until the expiration of this contract will pay all its running expenses including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture, and tackle at the expiration of this contract to the owner or his agent at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire nor do anything in contravention of its status

as a yacht, nor in the sailing or navigating of the same, do
333 anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00) and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention.

The hirer shall be liable and responsible for any and all loss and damage to hull, equipment, tackle, spars, furniture or the like.

That the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, tackle, spars, furniture, gear, boats and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
Agent for William L. Moore, Owner.
CHESTER S. LORD,
For the Sun Printing & Publishing Company.

334 LIBELLANT'S EXHIBIT 4.

Memorandum of agreement made and entered into this 14th day of May, 1898, by and between William L. Moore of the city of New York, by Thomas Manning his agent, party of the first part, hereinafter called the owner, and Chester S. Lord of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore being the owner of the steam yacht *Kanapaha* enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of four months from the first day of June expiring on the first day of October now next ensuing for the sum of ten thousand dollars ($10,000.00) payable on the signing of this agreement.

That the hirer will carry out the provisions of the charter-party made on the first day of April last and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses including amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract, to the owner or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear

and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand
335 dollars ($75,000.00) and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention.

The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture, or the like.

That the hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats, and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING.
CHESTER S. LORD,
For the Sun Printing and Publishing Association.

LIBELLANT'S EXHIBIT 5.

Whereas by agreement or charter-party dated May 14th, 1898, William L. Moore, of the city of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the city of New York, hereinafter called the hirer, the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club, as will more fully and at large appear by a copy of said agreement or
336 charter-party hereunto annexed and hereby made part hereof.

Now at the request of the said hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged.

We, the Sun Printing and Publishing Company, of the city of

New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

First. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

Second. That we expressly waive and dispense with notice of any demand, suit, or action at law against the hirer and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

Third. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000.00).

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

STATE OF NEW YORK, }
County of New York, } ss:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of the Sun Printing & Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said company as its act and deed.

[SEAL.]

A. H. BRADLEY,
Notary Public, New York.

337 LIBELLANT'S EXHIBIT 8.

NEW YORK, *April* 23, 1898.

The Sun Printing & Publishing Association to Chubb & Son, Dr.

To cost of insurance on hull, mach'y, etc., of the steam yacht *Kanapaha* for two months from April 2, 1898, $58,560, @ 2½ % =	1,464.00
Stamp charges	14.64
	$1,478.64

CHUBB & SON.

Paid Jun- 1, 1898. New York.

Please receipt & return to L. O. Macdaniel, the Sun, New York.

LIBELLANT'S EXHIBIT 9.

NEW YORK, *June* 11, 1898.

The Sun Printing & Publishing Association to Chubb & Son, Dr.

To cost of insurance on yacht *Kanapaha* from June 2, '98, to Aug. 2, '98, $58,560, @ 2¾ % = ... 1,610.40
14.64

1,625.04

Paid.

CHUBB & SON.

Paid by m'g'r check # 39812 July 12, '98.

338 LIBELLANT'S EXHIBIT 10.

NEW YORK, *July* 30, 1898.

The Sun Printing & Publishing Association to Chubb & Son, Dr.

To cost of insurance on yacht *Kanapaha* from August 2, '98, for one month, $58,560, @ 1¼..... 732.00
Stamp charges.... .... 14.64

746.64

Paid.

CHUBB & SON.

Paid by m'g'r check # 40423 Aug. 16, '98.
Please receipt & return to L. O. Macdaniel, the Sun, New York.

339 LIBELLANT'S EXHIBIT 11.

From Morning Sun of Sunday, September 11th, 1898.

Yacht *Kanapaha* wrecked.

All hands saved—one of the Sun's despatch boats during the war.

Special cable despatch to the Sun.

SANTIAGO DE CUBA, *Sept.* 10.—Gen. Lawton received a despatch today from the north coast of the island saying that the steam yacht *Kanapaha*, Capt. Atchinson, was wrecked on the reefs above the Bay of Nipe, north coast of Santiago province, Sept. 8. The boat was a total loss. All hands were saved.

The *Kanapaha* was chartered by the Sun before the outbreak of the war as a despatch boat. She was formerly J. Pierpont Morgan's first *Corsair*. She was built in 1880 at Philadelphia. Her length was 173½ feet, her beam 23 feet and her depth 11½ feet. Her gross tonnage was 248. Her owner was W. L. Moore. The *Kanapaha*

sailed from Santiago with Gen. Miles when the army left for Porto Rico. When wrecked she was on her way from Ponce to Havana. She sailed from Ponce on Sept. 1, stopping on the way at Guanica and Mayaguez.

Capt. Atchinson is a thoroughly able skipper. He has had command of a number of private yachts of prominent Americans. The *Kanapaha* was the fastest and most seaworthy newspaper despatch boat in the West Indies during the war. The Sun's representative aboard her was Mr. W. J. Chamberlin.

340 LIBELLANT'S EXHIBIT 12.

Whereas, by agreement or charter-party dated April first, 1898, William L. Moore, of the city of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the city of New York, hereinafter called the hirer, the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club as will more fully and at large appear by a copy of said agreement or charter-party hereunto annexed and hereby made part hereof.

Now, at the request of the said hirer and for valuable consideration received from him, and in consideration of one dollar from the said owner received, and receipt whereof is hereby acknowledged.

We, The Sun Printing and Publishing Company of the City of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

First. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

Second. That we expressly waive and dispense with notice of any demand, suit, or action at law against the hirer and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the hirer to be kept and performed.

The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

Third. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000).

In witness whereof we have hereunto set our hands this first day of April, 1898.

CHESTER S. LORD,
For the Sun Printing and Publishing Company.

Witness:
THOMAS MANNING.

341 STATE AND COUNTY OF NEW YORK, *ss:*

On this second day of April, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of the Sun Printing & Publishing Company, and who duly acknowledged that he executed the above undertaking for and on

behalf of his firm, under authority of said company as its act and deed.

JAMES P. J. MORRIS,
Notary Public, N. Y. Co.

[SEAL.]

LIBELLANT'S EXHIBIT 13.

By-laws of the Sun Printing and Publishing Association as Amended June 28, 1898.

ARTICLE I.

The annual election of trustees shall be held at the office of the association on the Monday preceding the fourth Tuesday in May, from noon till 12.30 o'clock p. m.

At the first meeting of the trustees after their election there shall be chosen by ballot a president and a secretary.

Vacancies among the trustees may be filled by the remaining trustees at any meeting after they occur, and the persons so chosen shall retain their places until the next annual election for trustees.

ARTICLE II.

342 The trustees shall hold a regular meeting at the office of the association on the fourth Tuesday of each month, at 1 o'clock p. m. Special meetings shall be called by the secretary whenever requested by two or more trustees.

ARTICLE III.

The trustees may call meetings of the stockholders at any time; and it shall be their duty to call such meetings whenever they are requested to do so, in writing, by the president, or by stockholders holding a majority of the stock. Each stockholder shall be notified in writing of all such meetings, at least seven days before the time of holding the same.

ARTICLE IV.

Three trustees shall constitute a quorum, and the representatives of one hundred and seventy-six shares of stock shall constitute a quorum of the stockholders for the transaction of business at any meeting.

ARTICLE V.

The president and secretary shall sign all certificates of stock, and make all transfers of the same on the books of the association.

ARTICLE VI.

The trustees shall not sell or alienate the title and good will of the Sun, nor sell the real estate belonging to the association, without first calling a meeting of the stockholders and obtaining the consent of the holders of two-thirds of the whole stock.

ARTICLE VII.

These by-laws may be amended by the affirmative vote of three trustees, at any meeting, after a week's notice of such proposed amendment.

343 LIBELLANT'S EXHIBIT 14.

NEW YORK, *Jul-* 12, 1898.

Mess. Chubb & Son, New York.

GENTLEMEN: Referring to the enclosed bill, are marine rates for such a risk as this sufficiently reduced to make it worth canceling this insurance and writing for say a month? Or will the rate probably be still lower by Aug. 2d.

Very truly yours, L. O. MACDANIEL, *Cash'r.*

Can't be cancelled to advantage as there is no return if you expect to use.

344 LIBELLANT'S EXHIBIT No. 21—April 24, 1899.

[SEAL.]

Issued May 4, 1898.

HYDROGRAPHIC OFFICE.

Sailing directions are corrected to date of issue. Two copies of H. O. notices to mariners and one copy of a supplement will be furnished. Supplements cancel all previous notices to mariners. Navigators will correct light lists and sailing directions from notices to mariners and supplements.

List of Notices to Mariners and Supplements Affecting this Volume Since Issue.

Title. Date of receipt.	Date of publication.	Corrections. Date of entry.

345 EXHIBIT 21—pp. 122, 123.

Port Nuevitas del Principe.—From Nuevas Grandes the coast takes a N. W. direction for 13 miles to Nuevitas del Principe, is skirted by a reef all the way, and should not be approached within 2½ miles.

Nuevitas is the port of Puerto Principe, about 45 miles distant, the two places being connected by a railway. The land is low on both sides of entrance; the town is surrounded by hills from east to S. W.; back of the town the land is low. The entrance of the harbor may be recognized by the Maternillos light-house, by three small hills on the south side of the harbor, and by three islets in the harbor called Los Ballenatos, a little higher than the surrounding land. Also on the east side of the entrance is a quadrangular building painted yellow, surmounted by a white mast, from which is shown a light.

Light.—On Barlovento or Pilot point, the east side of the entrance is a quadrangular building painted yellow, and a white mast stands in the middle of it, from which is exhibited, 48 feet above the sea, a white light visible 9 miles.

Maternillos point is 4½ miles from the entrance to Port Nuevitas. The coast between is low, but free of danger. The point is surrounded by a coral reef called the Corona de Maternillos. From Maternillos point as far westward as Icasos point, a space of nearly 250 miles, the coast is bordered with low mangrove cays and reefs to the distance in some places of 20 miles from the mainland. The greater part to the westward of Paredon point is but imperfectly represented on the charts, and, being studded with dangers, steep-to, should be most cautiously approached.

Light.—The light-house on Maternillos point is 170 feet high, white, with the word Colon painted on it, and exhibits, 174 feet above the sea, a fixed and flashing white light every 48 seconds, duration of flash 5 seconds. The light should be visible 17 miles.

346 RESPONDENT'S EXHIBIT A—April 17, 1899.

By-laws of the Sun Printing and Publishing Association, Amended June 27, 1893.

ARTICLE I.

The annual election of trustees shall be held at the office of the association on the Monday preceding the fourth Tuesday in May, from noon till 12.30 o'clock p. m.

At the first meeting of the trustees after their election there shall be chosen by ballot a president, who shall be *ex officio* a member of such of the standing committees; a secretary, and also by ballot (unless otherwise ordered by the trustees) two standing committees, viz., an executive committee and an examining committee, each consisting of three members.

Vacancies among the trustees may be filled by the remaining trustees at any meeting after they occur, and the persons so chosen shall retain their places until the next annual election for trustees.

ARTICLE II.

The trustees shall hold a regular meeting at the office of the association on the fourth Tuesday of each month at 1 o'clock p. m. Special meetings shall be called by the secretary whenever requested by two or more trustees.

ARTICLE III.

The trustees may call meetings of the stockholders at any time; and it shall be their duty to call such meetings whenever they are requested to do so, in writing, by the president, or by stock-
347 holders holding a majority of the stock. Each stockholder shall be notified in writing of all such meetings, at least seven days before the time of holding the same.

ARTICLE IV.

Three trustees shall constitute a quorum, and the representatives of one hundred and seventy-six shares of stock shall constitute a quorum of the stockholders for the transaction of business at any meeting.

ARTICLE V.

The president and secretary shall sign all certificates of stock, and make all transfers of the same on the books of the association.

ARTICLE VI.

The trustees shall not sell or alienate the title and good will of the Sun, nor sell the real estate belonging to the association, without first calling a meeting of the stockholders and obtaining the consent of the holders of two-thirds of the whole stock.

ARTICLE VII.

The executive committee shall have the supervision of all the property of the association contained in their building, and of the building itself. It shall be their duty to rent such portion of the same as is not required for the use of the association, and to see that all necessary alterations and repairs are faithfully and economically executed; but no expenditure shall be made by the committee exceeding the sum of five hundred dollars unless by authority of the trustees. They shall report their doings to the trustees at each regular meeting.

It shall be the duty of the examining committee to examine the accounts of the association, and to inquire into both the receipts and disbursements of money. They shall report to the trustees at each regular meeting.

348 ARTICLE VIII.

These by-laws may be amended by the affirmative vote of three trustees, at any meeting, after a week's notice of such proposed amendment.

RESPONDENT'S EXHIBIT B—April 24, 1899.

170 NASSAU STREET, NEW YORK, *April* 26, 1898.

The regular meeting of the board of trustees was held this day at 1 p. m.

Present: Paul Dana, Thos. Hitchcock and Franklin Bartlett.

Minutes of meeting held March 22nd, 1898, were read and approved.

The examining committee, reported the books correct to the 23rd inst., and recommended a dividend of 5% on the capital stock, payable June 1st, 1898, which on motion was so declared.

Mr. Hitchcock was appointed to investigate and report on the subject of the investment of surplus earnings.

Application was received from the Third Avenue R. R. Co. for permission to change their motive power; and on motion of Mr. Hitchcock it was

Resolved, That said application be hereby granted, and the president be authorized to sign same and affix the corporate seal of this association to said instrument.

On motion the meeting adjourned.

Attest: L. O. MACDANIEL,
Rec'd'g Sec'y.

349 United States District Court, Southern Dist . of New York.

WILLIAM L. MOORE
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION. } In Admiralty.

Zabriskie, Burrill & Murray for libellant.
Franklin Bartlett for respondent.

BROWN, *J.*:

The above libel was filed to recover for the loss of the yacht *Kanapaha* by stranding on September 5th, 1898, when she ran upon a reef on the north coast of Cuba, about 2½ miles from the shore and about seven miles east of Nuevitas while proceeding westward in the service of the defendant. The yacht had been chartered through the negotiations of Chester S. Lord, manager of the news department of the Sun newspaper, first for a period of two months for $5,000, by charter dated April 1st, 1898, and afterward by charter dated May 14th, 1898, for $10,000 more for four months from June 1st to October 1st, 1898 The yacht was used by the Sun as a despatch-boat for obtaining news pertaining to the Spanish war in cruising in Cuban waters. In both charters Mr. Lord was desig-

nated as the "hirer" of the yacht; but each charter was signed "Chester S. Lord, for the Sun Printing and Publishing Company." The charter provided that the hire should be paid on signing the agreement, and that the hirer should man and equip the yacht, pay all expenses and surrender her in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free from all liens and charges, and be liable and respon-
350 sible for any and all loss and damage to hull, equipment, &c. In each charter there was also the further provision:

"That, for the purpose of this charter, the value of the yacht shall be considered and taken at the sum of $75,000, and the said hirer shall procure security or guarantee to and for the owner, in the sum of $75,000, to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of this contract."

At the time of the execution of the second charter the yacht was at sea, in the service of the respondent, under the former agreement; and when the second charter was executed and delivered the agreement of suretyship which it called for was at the same time delivered to the libellant. This latter agreement purports to be between the Sun Printing and Publishing Company and the libellant. It refers to the charter dated May 14th, 1898, as annexed and made part thereof, and declares that, at the request of the hirer, the defendant "enters into the following understanding and agreement of *suretyship:* First, that the hirer will well and faithfully perform everything in the annexed agreement upon his part to be performed; second, that the respondent expressly waives and dispenses with notice of any demand, suit or notice of non-performance, &c., the intention of this understanding being *to hold us primarily liable* under the terms of the annexed agreement;" third, "that our liability hereunto *shall in no case exceed the sum of $75,000.*" This instrument, instead of being executed by some other person than Mr. Lord, was signed like the charter itself, "Chester S. Lord for the Sun Printing and Publishing Association," without more; and it was acknowledged by him before a notary public, as done "under authority of said company and as its act and deed."

The answer denies that Mr. Lord had any authority to execute either the charter-parties or the agreement of suretyship on
351 account of the defendant, or that the defendant was bound thereby; it admits that the yacht was used as a despatch-boat by the defendant corporation in cruising and obtaining news, until she was stranded; and alleges that in executing the above papers Mr. Lord acted on his own responsibility and without the authority of the defendant's board of trustees or of any of its members; that the defendant has fully paid for the use made of the yacht by the defendant, and that the yacht was lost by sea perils, without any fault or negligence on the part of defendant or its employees.

Up to within a few days of the loss of the yacht she had been kept insured for the sum of $60,000 under various policies taken out

by Chubb & Son, as agents, for which on three different occasions bills had been rendered to the defendant and the premiums paid by the defendant's checks. These insurances, however, which had been previously three times renewed all expired on September 1st, four days before the yacht was stranded, and were not again renewed. The libellant claims that the defendant is responsible as principal under the charter as well as under the guarantee; and that the loss being total, the liability is fixed at $75,000 as in a valued policy; and that the defendant is, therefore, liable under the agreement for that amount.

I. The first question litigated is whether the charter is to be held in the contract of the Sun or as only the agreement of Mr. Lord, through lack of authority on his part to bind the defendant. The two papers are inartificially drawn and executed. The intention of the owner apparently was to let the ship nominally and in form to Mr. Lord, who is called the "*hirer;*" and at the same time to take a guarantee from The Sun, the defendant, by which it should make itself virtually the principal; but Mr. Lord evidently did not understand that he was hiring the yacht individually, since he did not sign the charter in his own name simply or for himself, but only "for the Sun Printing and Publishing Company." And the guar-
352 antee annexed to the charter, which purported to bind the Sun as "primar-ly liable," *i. e.*, as virtual principal, was not signed by any officer of the Sun as an independent obligation would naturally have been signed, but by Mr. Lord only, "for the Sun Printing and Publishing Association." The two papers must be construed together, therefore, and as forming one contract; so that if Mr. Lord had authority to bind the Sun, it must be held from the form of the signatures to both papers that the defendant is bound thereby, since it is obvious that Mr. Lord intended to bind the Sun and not himself.

Though written charters of vessels were formerly made under seal and the forms still in use thus read, they have long since ceased to be usually executed under seal. Indicating only the letting and hiring of the vessel according to the terms agreed on, the charter is equally valid if by patrol only, and patrol charters are constantly enforced in this court. The authority to execute unsealed charters like the present, therefore, does not differ in its nature or circumstances from that required for making any other business contract, and in case of dispute the authority to execute it is to be gathered from all the legitimate evidence and circumstances bearing upon it.

In the present case none of the immediate parties to the negotiation or to the execution of the contract have been examined as witnesses; neither Mr. Lord on the part of the defendant, nor Mr. Manning, who was the agent of the libellant, and who executed the charters on the libellant's part. Many circumstances, however, are brought out in the evidence in regard to the conduct of the parties during the charter period, as well as before, from which no doubt is left in my mind that these contracts must be deemed legally to be the contracts of The Sun, the defendant; that Mr. Lord had such

general authority as was sufficient to enable him to enter into these contracts; that he intended to bind the defendant and not himself, and that the trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht and
353 such perfect means of knowledge of all the particulars, had they desired to know them, as to make their acts in using the yacht under the charters, as they did, a ratification of Mr. Lord's action, and to bind them for the performance of his agreements made in their behalf. The following are some of the principal of these circumstances:

Mr. Lord had for twenty years been the manager of the news department of the Sun, and as such had been accustomed to make all necessary contracts in that department, and to engage, direct and send out reporters to procure news; for that purpose he had been previously accustomed to hire boats to accompany races, and during the war with Spain he also hired two other boats at different times for similar use as the *Kanapaha*. His bills incurred in this business were paid by the defendant either in cash or by checks to his order, entered in the books of the defendant, examined and reported monthly, and approved by the defendant. The same course was pursued as regards the charter hire and all the expenses of the *Kanapaha* during the five months previous to her loss. The charter money on both charters, viz., $5,000 and $10,000 respectively, was paid in advance in April and May by checks of the defendant; the premiums of insurance at three different times were also paid by the defendant's checks; and all these checks were reported and entered in defendant's books in the usual course. The yacht, and the other boats employed at the same time, were used exclusively for the benefit of the defendant in procuring news through reporters under the direction of Mr. Lord, and this yacht was navigated from place to place by the master and crew as directed by the Sun reporter in charge. All the expenses of the outfit, maintenance, wages and repairs of the vessel were born- and paid by the Sun. About $5,000 was received from other publishers for news obtained by this yacht and sold to them by Mr. Laffan, the general business and financial
354 manager of the defendant and one of its trustees. Mr. Dana, the president of the defendant, had general information of the arrangements made by Mr. Lord to procure news by means of these different vessels, although he made no inquiry as to details, as these were generally left to Mr. Lord's management. Mr. Laffan was not examined as a witness, and the other two trustees of the defendant gave no attention to any of the particulars of Mr. Lord's department.

From these circumstances it is evident that the hiring of the yacht was for the exclusive use of the Sun, and not for any personal use by Mr. Lord; that it was used for the Sun's benefit only, and in the customary line of Mr. Lord's employment in procuring news; and there being no suggestion of any concealment of any of the particulars from the trustees and full means of knowledge being available to them, the above circumstances together with the

payment of all expenditures by the defendant, leave no doubt of the ratification by the defendant of Mr. Lord's acts, equivalent to an original authority, even if any doubt could exist of Mr. Lord's original authority arising from the larger responsibilities attached to these later contracts.

II. The yacht having been totally lost, the defendant under the agreement in the charter "to be liable and responsible for any and all loss and damage" as well as by the agreement to surrender the yacht "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted" as well as under the agreement of suretyship, so called, engaging that the hirer should "well and faithfully perform and fulfil everything in and by the said agreement on his part to be kept and performed,"—became liable to the libellant for his loss and damage through the failure to return the yacht on the first of October, when the charter expired. The libellant contends that he should be paid $75,000 for this loss and the failure to return the yacht; because the charter contains the statement that "for the purpose of this charter
the value of the yacht shall be considered and taken at the
355 sum of $75,000." It is noticeable, however, that neither in the immediate context nor anywhere in the charter or in the agreement of suretyship, is there any agreement that the sum of $75,000 should be paid for the failure to return the yacht at the end of the charter period. That clause in the charter, on the contrary, stands in immediate connection with, and seems to be the inducement to, the further clause by which the hirer agrees to "procure security or guarantee to the owner in the sum of $75,000 against any and all loss and damage which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract." One very important part of the contract and its obligations was the payment of the charter hire of $10,000; and the security required to be given by the terms of the charter and by the agreement of suretyship, which was in fact given and delivered at the same time the charter was signed, includes, therefore, the payment of the charter hire as well as the performance of the many other obligations contained in the charter. The charter hire of $10,000, as the evidence shows, was paid by the Sun's check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16th. So much of its obligation of $75,000 has, therefore, been discharged by the Sun; and the express provision of the second instrument, called the agreement of suretyship, is that "in no case shall the liability of the Sun exceed the sum of $75,000." Even if the two agreements be regarded as virtually one, as it would seem they must be, still this latter clause must control the general expressions preceding; and this leaves, after the Sun's payment of $10,000 for the charter hire, but $65,000 principal as the limit of any further obligation on its part.

Looking at the different clauses of the agreement and the circumstances, I think the libellant is entitled to a judgment for the

above sum with interest from October 1st, and that this con-
356 struction alone can reasonably give effect to the apparent intention of the parties. Some effect must be given to the clause declaring that $75,000 shall be considered and taken as the value of the yacht. This means, I think, the value at the beginning of the charter period. Considering that the yacht was to be used continuously in cruising in belligerent waters, the special risk incident to such navigation, the actual depreciation of the yacht even though any accidental damages from such navigation were reasonably well repaired, as well as the ordinary depreciation from reasonable wear and use, which the charter recognizes and contemplates, and considering further that the charter period terminated at about the close of the ordinary yachting season, when opportunities for letting or rechartering would be much diminished—there can be no doubt that the value of the yacht at the close of the charter period must have become and must have been expected to become, very considerably less than at the beginning; while the large amount of the charter hire—$10,000—a considerable proportion of the whole value of the yacht at the date of the charter, shows that the intention was to compensate the owner fully for all such risk and depreciation. Taking, therefore, the value fixed, namely $75,000 as the agreed value of the yacht at the beginning of the charter on the one hand, and the express limitation that in no event should the liability of the defendant exceed $75,000 on the other hand, of which the $10,000 charter hire was a part, and has been paid by the defendant, the payment of the remaining $65,000 with interest from the termination of the charter period should be regarded as meeting the intention of the parties.

Any different construction, it seems to me would manifestly contradict the presumed intention. Suppose the vessel had been lost at the end of the first week of the charter period; is it possible to suppose either that the libellant expected to receive, or that the defendant expected to pay $75,000 besides the $10,000 already paid
and received, making $85,000 in all? To me it seems mani-
357 festly not. That would be $10,000 more than the entire value put upon the yacht; and it may certainly be assumed that the libellant in fixing the estimated value at the beginning of the charter made it sufficiently high to afford him perfect indemnity. And so if the yacht had been lost before the charter hire was paid—and it often happens that the payment of charter hire agreed to be paid at the execution of the charter, is more or less postponed—it seems clear that the Sun could not have been required to pay more than $75,000 in all; and the fact that the charter hire was paid by the Sun, and the yacht loss later, cannot increase the extent of the Sun's liability. The further fact that the yacht was insured by the defendant in the sum of $60,000, though not binding upon the libellant, because not an act to which he was privy, is at least to some extent indicative of the proximate liability for the yacht herself, as understood by the defendant, though not of course conclusive. Had the intention of the parties been that the sum of $75,000 should be paid to the libellant for failure to return the yacht at the close of

the charter period, it seems to me that some more direct language indicative of that purpose would have been used in the charter. The entire absence of any direct expression of that kind, and the absence of any provision requiring the defendant to insure the vessel or keep her insured in any specific sum, are opposed, as it seems to me, to the present contention of the libellant in this regard; while the specific provision that the entire liability of the defendant should not exceed $75,000, (including the payment of the charter hire, which the defendant has already paid) indicates the remaining sum of $65,000, with interest as the amount required to be paid upon the total loss of the yacht.

The valuation clause in marine policies of insurance is not analogous, I think, to this charter. In such policies that clause has reference to a single object, namely, the rights of the parties upon a loss by sea peril. In this charter its object was to determine also
358 the amount of security, which was designed to cover and does cover a multitude of particulars, as well as the important obligation to pay the charter hire.

Decree accordingly for $65,000, with interest as above and costs.

June 28th, 1899.

At a stated term of the district court of the United States of America for the southern district of New York, held at the post-office building, in the city of New York, on the 23rd day of August, 1899.

Present: Hon. Addison Brown, judge.

WILLIAM L. MOORE
against
SUN PRINTING AND PUBLISHING ASSOCIATION.

This cause having been heard on the pleadings and proofs, and having been argued by the advocates for the respective parties, and due deliberation having been had in the premises; it is—

Ordered, adjudged and decreed, that the libellant recover from the respondent the sum of sixty-five thousand dollars ($65,000), with interest thereon from October 1st, 1898, amounting to three thousand four hundred and eighty-eight $\frac{35}{100}$ dollars ($3,488.34) together with the sum of one hundred and forty-one $\frac{3}{100}$ dollars ($141.03) for his costs and disbursements as adjusted, amounting in all
359 to the sum of sixty-eight thousand six hundred and twenty-nine $\frac{37}{100}$ dollars ($68,629.37).

And it is further ordered, that unless this decree be satisfied or an appeal be taken therefrom and security be given within the time provided by the rules and practice of this court then the said respondent and its sureties cause the engagements of their stipulations and bonds to be performed and satisfied or show cause before this court why judgment should not be entered against them for the amount aforesaid decreed and why execution should not issue thereon against their goods, chattels and lands.

ADDISON BROWN.

(Endorsed:) Final decree. Filed Aug. 24, 1899.

District Court of the United States for the Southern District of New York.

WILLIAM L. MOORE, Libellant and Appellee,
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent and Appellant.

SIRS: Please take notice that the respondent above named hereby appeals to the United States circuit court of appeals for the
360 second circuit from the final decree and judgment entered herein on the 23d day of August, 1899, and from each and every part thereof.

Dated New York, August 31st, 1899.

Yours, &c., FRANKLIN BARTLETT,
Proctor for Respondent and Appellant,
82 Times Building, Borough of Manhattan, New York City.

To Zabriskie, Burrill & Murray, Esqrs., proctors for libellant and appellee; Samuel H. Lyman, Esq., clerk of the district court of the United States for the southern district of New York.

(Endorsed:) District court of the United States, southern district of New York. William L. Moore, libellant and appellee, against The Sun Printing and Publishing Association, respondent and appellant. Notice of appeal. Franklin Bartlett, proctor for resp'd't & app'l't, 82 Times building, borough of Manhattan, New York city. Served Sept. 7, 1899.

361 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM L. MOORE, Libellant and Appellee,
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent and Appellant.
Assignment of Errors.

Afterwards, to wit, on the — day of ——, before the justices of the United States circuit court of appeals in the second circuit, at the post-office building, in the borough of Manhattan, city of New York, comes The Sun Printing and Publishing Association by Franklin Bartlett, its proctor, and says that in the record and proceedings aforesaid there is manifest error, in which, to wit:

First. A. It appears by the record that the court erred in admitting in evidence the cheque for $5,000, dated New York, April 2nd, 1898, because such cheque was incompetent and improper, irrelevant and immaterial, as it was a payment made under an alleged charter-party which expired by its very terms on May 31st, 1898, prior to the execution of the second alleged charter-party, during the pendency of which the vessel was lost.

This cheque was objected to as incompetent, irrelevant and immaterial; and on the special ground that whatever took place under

the charter-party which had expired long prior to the loss of the vessel was irrelevant.

362 The court admitted the cheque and exception was duly taken by respondent.

Sten. Min., p. 11.

First. B. It appears by the record that the court erred in admitting in evidence the receipt for $1,476.64, insurance on the yacht *Kanapaha* paid by the Sun during the existence of the first alleged charter-party which expired on May 31st, 1895, and long prior to the loss of the yacht *Kanapaha*.

This receipt was objected to as incompetent, improper, irrelevant and immaterial, and on the specific ground that the insurance relates to the first charter-party, which had expired at the time of the loss of the vessel.

Objection was overruled, and exception was duly taken by the respondent.

Receipt was marked Libellant's Exhibit No. 8.

4 & 5 Sten. Min., p. 23.

Second. It appears by the record that the court erred in admitting in evidence the following statement from the Sun newspaper of May 3d, 1898:

"The Sun's yacht, the *Kanapaha*, met the *Nashville* 15 miles northeast of Havana; both were looking for the flagship."

This evidence was objected to as incompetent, improper, irrelevant and immaterial, but the evidence was admitted, and an exception was duly taken by the respondent.

4 & 5 Sten. Min., pp. 59, 60.

Third. It appears by the record that the court erred in admitting in evidence the statement of the wreck of the yacht *Kanapaha* published in the Sun of December 11, 1898. In this article it was stated "Yacht *Kanapaha* wrecked. All hands saved. One of the Sun's despatch-boats during the war."

363 The paper containing the article when offered in evidence was objected to as incompetent, improper, irrelevant and immaterial, and on the specific ground that respondent could not be bound by any statement made in the paper as to a charter.

Sten. Min., pp. 61, 62.

The court reserved its ruling on these papers.

The statement contained in the Sun was immaterial considered as an article, and it was incompetent evidence to prove the facts in the article stated.

Fourth. It appears by the record that the court erred in admitting in evidence the letter of the cashier of the Sun to a member of the firm of Chubb & Son, insurance agents.

The letter was objected to by respondent as irrelevant, immaterial and incompetent and improper, and on the special ground that the respondent could not be bound by letters of the cashier except within the scope of his power.

The court admitted the letter, and an exception was duly taken by the respondent.

The letter was marked Libellant's Exhibit No. 14.

Sten. Min., p. 117.

Fifth. It appears by the record that the court erred in admitting in evidence the statement of Albert Lee, the editor of "Harper's Round Table," as to a conversation with Mr. Chester S. Lord, managing editor of the Sun, had in March, 1898, prior to the execution of the first alleged charter-party.

The admission of this evidence was objected to as incompetent, immaterial, irrelevant and improper, and on the specific ground that it called for an interview prior to the making of the charter-party.

The objection was overruled, and an exception was duly taken by respondent.

Sten. Min., p. 167.

Sixth. It appears by the record that the court erred in admitting the following question propounded by Mr. Hughes, of coun-
364 sel for the libellant, to Mr. Anon H. Bradley, a notary public:

"Q. You will not say they were not?"

Mr. Bradley, on cross-examination, had stated, in answer to Mr. Bartlett's question:

Q. But you don't know whether the words, "for the Sun Printing and Publishing Association," were there at the time?

A. I do not.

He was then asked by Mr. Hughes: "You will *will* not say they were not?"

This question was objected to by respondent as incompetent, improper, irrelevant and immaterial, and on the special ground that the counsel should not be permitted to cross-examine his own witness. The objection was overruled, respondent duly excepted, and the witness answered: "No, I will not say they were not."

Sten. Min., pp. 173, 174.

Seventh. It appears by the record that the court erred in admitting the following question propounded by libellant's counsel to Ferdinand B. Knight:

Q. Can you state from your experience of those harbors whether that reef is a well-known reef? (referring to the reef upon which the yacht *Kanapaha* was wrecked).

This question was objected to as incompetent, irrelevant, improper and immaterial, and on the further specific ground that the witness cannot state as to the information of other persons. The objection was overruled, and an exception was duly taken by respondent.

Witness answered "Yes."

Sten. Min., pp. 201 and 204.

Eighth. It appears by the record that the court erred in allowing

the witness Knight to explain how he would get his distance off shore. The witness was asked:

Q. Can you get your distance off shore in that way?
A. Yes.

365 He was then asked:

Q. Will you explain how you do it?

The question was objected to as immaterial, incompetent, irrelevant and improper and on the ground that this is not an educational institution. Objection was overruled, and an exception was duly taken by respondent. The witness answered as follows:

A. For instance, a ship is steering north to make an object bearing northwest; the ship is going twelve miles an hour which is a mile in five minutes. Take the time when the object bears northwest and again when it bears west, and the time elapsed calculated with the distance the ship is making will give you the distance the ship is off from the object when it bears west or when it is abeam. 4 and 5 Sten. Min., p. 211.

Ninth. It appears by the record that the court erred in allowing the witness Knight to answer the following question:

Q. I will ask you whether in steaming along the north coast of Cuba on a northwesterly course to make the old Bahama channel and at a rate of from 11 to 12 knots an hour, so that at about half past seven the steamer is found about 7 miles east of the Eastern Point light, it would be possible in clear weather, if you were in sight of shore, most of the day, to ascertain up to and including sunset the true position of the steamer?

This question was objected to as immaterial, incompetent, irrelevant and improper. Objection was overruled and exception duly taken by respondent.

The witness answered: "Yes."

Sten. Min., pp. 212, 213.

Tenth. It appears by the record that the court erred in allowing the witness Knight to answer the following question:

Q. I would like to ask you whether in steaming along the north coast of Cuba at a rate of about 11 to 12 knots an hour, a northwesterly course to make the old Bahama channel, so that about half past seven o'clock in the afternoon you are found about 7

366 miles east from the Eastern Point light of Neuvitas, it would be possible by taking observations and bearings in the course of the day to ascertain whether a current was or was not setting you in towards the shore?

This question was objected to as immaterial, incompetent, irrelevant and improper. Objection was overruled and exception duly taken by respondent.

The witness answered: "It would be possible to ascertain during the day that you had been set in shore."

Sten. Min., p. 213.

Eleventh. It appears by the record that the court erred in allowing the witness Knight to answer the following questions:

Q. Suppose you were taking a northwesterly course and along the north coast of Cuba, bound for the old Bahama channel, and expecting to see Manzanilla light off Nuevitas harbor about the time it became dark, and you were at sunset about 18 miles east of Nuevitas harbor, failing to see the light at dark what would you do?

Objected to as immaterial, incompetent, irrelevant and improper and on the specific ground that it assumes facts not proven, and on the further specific ground that it is hypothetical and calls for a conclusion of the witness.

Objection was overruled and exception duly taken by respondent.

A. Stop and steer off shore.

Q. Will you explain why?

Same objection, ruling and exception.

A. It isn't safe to run for an object when you expect to see it and don't see it; it isn't safe to run your distance up.

Sten. Min., pp. 213, 214.

Twelfth. It appears by the record that the court erred in admitting in evidence pages 122 and 123 of the publication of
367 the United States Hydrographic office with reference to the Caribbean sea and the gulf of Mexico and adjacent waters, issued in 1892.

The pages were objected to as incompetent, improper, irrelevant, immaterial and as not the best evidence of the facts therein stated. Objection was overruled and exception duly taken by respondent.

Sten. Min., p. 236.

Thirteenth. It appears by the record that the court erred in admitting in evidence an extract from page 5 of the edition of 1892 of the same book, that is, the United States Hydrographic office, with reference to the Caribbean sea and the gulf of Mexico and adjacent waters, issued in 1892.

The portion read in evidence was objected to as incompetent, improper, irrelevant, immaterial and as not the best evidence of the facts therein stated. Objection was overruled, and exception duly taken by respondent.

Sten. Min., pp. 236, 237.

Fourteenth. It appears by the record that the court erred in allowing the witness Carl W. Jungen to explain a paper pasted in the cover of a book, dated May 4, 1898. The question was:

Q. Will you please explain this paper that is pasted upon the inside cover of the book and state whether it was put there subsequent to the original issue of the book or not?

This question was objected to as incompetent, improper, and as calling for an explanation as to the contents of a paper which

speaks for itself. The court allowed the question and exception was duly taken by respondent. The witness answered as follows:

A. This paper that is pasted in here—when it was pasted in I don't know; it may have been prior to May 4, certainly not after, because it is stamped May 4, 1898; this book was originally
368 issued in 1892; this is simply a form that is pasted in here to show the date of issue and also for the owner of this book to enter on the receipt the number of notices to mariners that applied for correction in this book, and also to indicate to him when he refers to that book whether he has made the correction on his own chart to conform to the notice.

Sten. Min., pp. 243, 244.

The witness thus testified to facts which could not possibly have been within his own knowledge.

The witness admitted on cross-examination in answer to the question: "When did you ever see a slip like that before?" that he could not recall when he had seen it, but that he had seen it.

Sten. Min., p. 245.

Fifteenth. It appears by the record that the court, in view of its express declaration that all evidence of value was reserved for a future hearing, erred in giving the respondent no opportunity to prove the value of the yacht *Kanapaha* or to prove that it had been grossly overvalued in the alleged charter-party. This is shown by the following portions of the record:

When Mr. Bartlett objected to a question propounded to Mr. Frank B. Jones offered as an expert on the value of yachts, the question being: "Will you state whether there is any market value for steam yachts?" the court said: "I sustain the objection, but all questions on damages are reserved without prejudice to either party, the evidence is for the present excluded."

Sten. Min., pp. 192 and 196.

On page 254 of the record Mr. Hughes said:

Mr. HUGHES: We ask for the purpose of this record that the testimony of Capt. Atkinson as to the valuation of the yacht *Kanapaha*, and as to the value of other yachts, between pages 70 and
369 80 of his deposition be stricken out; save only the statement of Capt. Atkinson that a yacht has no market value.

The COURT: I shall strike out nothing from the deposition. I will note that on this hearing, no evidence as to damages will be considered, that all such evidence is to be reserved for hereafter.

Mr. HUGHES: We do not ask that it be stricken out of the deposition but that it be stricken out from this record, the deposition being in one aspect of the case entirely before your honor.

The COURT: I rule that all the evidence in Capt. Atkinson's deposition relating to damages is not considered as received upon this present hearing, but that that evidence and all other evidence on damage is reserved for future consideration in case any decree should be found for the libellant.

Mr. BARTLETT: Evidence as to the condition of the yacht, all that stands, of course?

The COURT: Do you mean her seaworthy condition?

Mr. BARTLETT: Her general condition, yes.

The COURT: No evidence on the question of damages is considered at this time.

Mr. HUGHES: We understand that that includes the evidence as to the value of the yacht?

The COURT: Of course.

Sten. Min., pp. 254, 255.

Sixteenth. It appears by the record that the court erred in not considering and in not giving any force and effect to the evidence of Captain Stephen B. Atkinson that the yacht *Kanapaha* would not have sold in September, 1898, or at any time in the summer of 1898, prior to the accident, for $30,000.

See deposition of Stephen B. Atkinson, pp. 24, 25.

Seventeenth. It appears by the record that the court erred in not considering and in not giving any force and effect to the
370 statement of Captain Stephen B. Atkinson that the yacht *Kanapaha* in 1898 was a boat eighteen years of age, and that the said yacht had no new engines, no new saloons, and no new tubes, and had nothing new about her excepting the boilers.

Deposition of Captain Atkinson, pp. 21, 25 and 26.

And that the said yacht had a low rate of speed, about eleven or twelve knots, and a large consumption of coal (p. 20), and that she had no electric-light plant and no ice plant, such as modern steam yachts always have.

Deposition of Capt. Atkinson, p. 19.

Eighteenth. It appears by the record that the court erred in holding that the alleged contracts, the charter-parties or charters executed by Chester S. Lord, the managing editor of the Sun, were legally the contracts of The Sun, the defendant. Opinion, p. 4.

Nineteenth. It appears by the record that the court erred in holding that Chester S. Lord had such general authority as was sufficient to enable him to enter into these contracts or charters. Opinion, p. 5.

Twentieth. It appears by the record that the court erred in holding that the trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht and such perfect means of knowledge of all the particulars had they desired to know them, as to make their acts in using the yacht under the charters as they did, a ratification of Mr. Lord's actions, and to bind them for the performance of his agreements made in their behalf. Opinion, p. 5.

Twenty-first. It appears by the record that the court erred in holding that the yacht having been a total loss, the defendant under

the agreement in the charter "to be liable and responsible for any and all loss and damage" as well as by the agreement to surrender the yacht "in as good condition as at the start fair wear and
371 tear from reasonable and proper use only excepted" as well as under the agreement of suretyship so called engaging that the hirer should "well and faithfully perform and fulfill everything in and by said agreement on his part to be kept and performed" became due and liable to the libellant for his loss and damage through its failure to return the yacht on the first of November when the charter expired. Opinion, pp. 6 and 7.

Twenty-second. It appears by the record that the court erred in holding that the libellant is entitled to a judgment for the above sum, to wit, $65,000, with interest from November 1st, and that this construction alone can reasonably give effect to the charter and intention of the parties. Opinion, p. 8.

Twenty-third. It appears by the record that the court erred in holding that some effect must be given to the clause declaring that $75,000 shall be considered and taken as the value of the yacht (Opinion, p. 8), because the sum of $75,000 was not inserted in the agreement of suretyship as liquidated damages but was inserted as a penalty.

Twenty-fourth. It appears by the record that the court erred in holding that the value fixed, namely, $75,000, should be taken as the agreed value of the yacht at the beginning of the charter. Opinion, p. 8.

Twenty-fifth. It appears by the record that the court erred in holding that any different construction than that taken by the court, would manifestly contradict the presumed intention. Opinion, p. 9.

Twenty-sixth. It appears by the record that the court erred in holding that the insuring of the yacht in the sum of $60,000 was at least to some extent indicative of the approximate liability for the yacht herself as understood by the defendant. Opinion, p. 9.

Twenty-seventh. It appears by the record that the court erred in not granting to the defendant before final judgment an op-
372 portunity to show that the fair market value of the yacht *Kanapaha* was far less than $65,000 or $75,000.

Twenty-eighth. It appears by the record that the court erred in not holding that even if there was a ratification by the defendant's trustees of the hiring of the yacht, there was no ratification by said trustees of the alleged valuation of the yacht at the sum of $75,000.

Twenty-ninth. It appears by the record that the court erred in granting a decree to the libellant for $65,000 with interest and costs.

Thirtieth. It appears by the record that the court erred in not rendering judgment for the defendant, dismissing the libel with costs.

And the said The Sun Printing and Publishing Association prays that the judgment may be reversed, annulled and altogether held

for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

Dated New York, October 7th, 1899.

FRANKLIN BARTLETT,
Attorney for The Sun Printing and Publishing Association, Respondent and Appellant, 82 Times Building, Borough of Manhattan, New York City.

(Endorsed:) Assignment of errors. Filed Oct. 9, 1899.

373 District Court of the United States for the Southern District of New York.

WILLIAM L. MOORE, Libellant,
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Appellant.

SIRS: Please take notice that the libellant above named hereby appeals to the United States circuit court of appeals for the second circuit, from the final decree and judgment entered herein on the 23d day of August, 1899, and from each and every part thereof.

Dated New York, September 9th, 1899.

Yours, &c.,

ZABRISKIE, BURRILL & MURRAY,
Proctors for Libellant, 21 Broad St., New York.

To Franklin Bartlett, Esq., proctor for respondent; Samuel H. Lyman, Esq., clerk of the district court of the United States for the southern district of New York.

(Endorsed:) Notice of appeal. Filed Sept. 9, 1899.

374 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM L. MOORE, Appellant,
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION.

The above-named libellant and appellant hereby assigns error to the decree of the district court of the United States for the southern district of New York in the above-entitled cause, as follows:

It appears by the record that the court erred in limiting the recovery by the libellant against the respondent, The Sun Printing and Publishing Association, to the sum of $65,000 and interest thereon from October 1st, 1898, inasmuch as the libellant was entitled to recover the sum of $75,000 and interest thereon from said date. For it appears from the record that in and by the charter-party and agreement of suretyship referred to in the libel herein it was provided that for the purpose of said charter the value of the yacht should be considered and taken at the sum of $75,000, and that said respondent would be and become liable for any and all losses and damages not exceeding the sum of $75,000, which might

be sustained by libellant by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of said charter-party.

And the court erred in failing to give full force and effect to such provisions and in holding that the charter hire of $10,000 paid to libellant at or before the time of the execution and delivery of said charter-party should be considered and taken as a payment
375 on account of said sum of $75,000, and should be deducted therefrom in determining the liability of the respondent under said charter-party and agreement of suretyship.

Opinion, pages 2, and 8 to 11.

Dated New York, October 11th, 1899.

ZABRISKIE, BURRILL & MURRAY,
Proctors for William L. Moore, Libellant and Appellant.

(Endorsed:) Assignment of errors. Filed Oct. 12, 1899.

376 UNITED STATES OF AMERICA, *Southern District of New York.*

WILLIAM L. MOORE, Lib'l't and Appellant,
vs.
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Resp'd't and Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America, for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals, for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 23d day of October, in the year of our
[SEAL.] Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-fourth.

SAMUEL H. LYMAN, *Clerk.*

377 United States Circuit Court of Appeals for the Second Circuit, October Term, 1899.

Submitted March 9, 1900; decided April 3, 1900.

WILLIAM L. MOORE, Libellant, Appellant,
vs.
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent, Appellant.

No. 123. Appeals from the District Court of the United States for the Southern District of New York. Before Judges Wallace, Lacombe, and Shipman.

WALLACE, *Circuit Judge:*

The yacht *Kanapaha* owned by the libellant was wrecked by stranding upon a reef on the northerly shore of the island of Cuba,

about two and one-half miles from the shore and about seven and one-half miles from Nuevitas, while proceeding westward to the port of Havana, and became a total loss. Her owner brought this action to recover her value against the Sun Printing and Publishing Association as the charterer of the yacht under whose control and management she was at the time. The charter provided that at the expiration of the charter term (four months, from June 1st to October 1st, 1898), the charterer would return the yacht "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." It also provided that the charterer should be "liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture, and the like," and that the charterer should "procure security and guaranty to and for the owner in the sum of $75,000 to secure any and all losses and damages which may occur to said boat or its belongings which
may be sustained by the owner by reason of such loss or
378 damage and by reason of the breach of any of the terms or conditions of this contract." The libel alleged the breach of these conditions, and also alleged that the yacht was lost by the negligent navigation of the charterer. The court below decreed in favor of the libellant, awarding him a recovery of $65,000 with interest. Both parties have appealed from the decree, the defendant insisting that it was not liable at all, and the libellant insisting that the damages awarded should have been $75,000 and interest.

That the Sun Printing and Publishing Association was the charterer of the yacht, notwithstanding Chester S. Lord was named as such in the contract, and that the corporation sanctioned and ratified his act in entering into the charter, we entertain no doubt; and we fully agree with the learned judge who decided the cause in the court below in respect to these propositions, and deem it unnecessary to enlarge upon the very satisfactory reasons assigned in his opinion. As the defendant was the real principal, the libellant was entitled to enforce the contract against it notwithstanding it purported to be a contract of the agent. New York & Charleston Steamship Co. *v.* Harbison (21 Blatch., 332, 336).

It is insisted for the charterer that the yacht perished without any fault on the part of those who were navigating her, and consequently that the case is one for the application of the principle, well settled in the law of bailments, that the hirer is absolved from further obligation where the hired thing is destroyed without his fault, so that redelivery to the bailor is impossible. This principle is deduced from the implied conditions of a contract of bailment by which the bailee only undertakes to exercise due care in the use of the article hired, and to restore it to the bailor in as good condition as when received, unless it be destroyed or deteriorated by natural decay or by external means without his default. The rule of the law of bailments does not conflict with the general principle that where a party by his own contract creates a duty or obligation upon himself he is bound to make it good, or answer
in damages, although prevented from performance by
379 inevitable accident. This principle is applicable to contracts of hiring as well as to all other contracts, and its appli-

cation is illustrated in numerous decisions in respect to a great variety of contracts. Thus it has always been settled that when a lessee has covenanted in his lease to keep the demised premises in good order, and surrender them to the lessor at the expiration of the term in as good order as they were originally, he is bound to rebuild although the premises are meantime destroyed by an accidental fire. Beach *v.* Crain (2 N. Y., 86); Hoy *v.* Holt (91 Pa. St., 88); Leavitt *v.* Fletcher (92 Mass., 119); Coler *v.* Celluloid Co. (39 N. J. Law, 326); Proctor *v.* Keith (12 B. Mon., 252); David *v.* Ryan (47 Iowa, 642). The principle has been applied with great strictness in charter-party contracts. Thus in Pope *v.* Bavidge (10 Ex., 33) where the charter provided that the vessel should make six specified voyages not later than a specified day, it was held to be no defense in an action by the charterer against the ship-owner that during the first three voyages the vessel was so damaged by accidents of the seas and navigation that she could not be repaired in time to perform the remaining voyages. In Burrell *v.* Crossman (35 U. S. Ap., 608) we had occasion in this court to apply it in the case of a charter-party and held that, inasmuch as the contract contained an absolute obligation to do certain acts within a time definitely fixed, non-performance was not excused although performance became impossible by events occurring without the fault of the promisor. In that case the defense was that performance was made impossible by the act of the public enemy, the war vessels of a foreign power. The cases which are sometimes referred to as exceptions to the general rule are not exceptions, but were those in which impossibility of performance existed when the contract was made and its obligations were held discharged upon the ground of mutual mistake, or those where the contract itself implied a condition that performance should be dependent upon the continued existence of the subject of the contract. The general doctrine may be stated in the lan-
380 guage of the court in Bailey *v.* Crespigny (L. R., 4 Q. B., 185):

"There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." A contract of hiring presupposes the continued existence of the thing hired during the term of hiring, and because the parties must have known that otherwise it could not be fulfilled and the whole contract is founded upon that understanding, the courts have construed express promises for the redelivery of the thing in as good condition as when received as intended merely to stand for the implied condition, and not as intended to impose a

more stringent liability upon the hirer. Such a case was Young *v.* Leary (135 N. Y., 569). That was an action to recover of a charterer the value of a vessel which was destroyed during the charter term by fire, and was brought for the breach of a condition in the charter to deliver the vessel to the owner at its termination "in the same good condition as she is now, ordinary wear and tear excepted." The court read the condition as intended to create no other obligation than would have been raised by implication without it, and said: "When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it." Decisions to the same effect are Ames *v.* Belden (17 Barb., 513), and Hyland *v.* Paull (33 Barb., 241). On the other
381 hand the supreme court of Massachusetts decided in an action brought to recover damages to the article hired caused by accidental injuries, where the contract contained a condition to return it "in as good order as when received, customary wear and tear excepted," that the bailee was not excused from performance. Harvey *v.* Murray (136 Mass., 377). In Drake *v.* White (117 Mass., 10) there was a bailment of personal property by a debtor who pledged it as collateral security for a loan to the defendants upon the express promise of the latter "to deliver the same, or its equivalent in money," on the payment of the loan. The court, holding the creditor not discharged by the destruction of the property by fire without his fault, based its decision upon the terms of the express contract to redeliver, and used this language: "If, in the common case of a pledge, the common-law contract was reduced to writing, it would contain among other things a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things: either to return the property specifically, or to pay for it in money."

The question in all cases of this kind is a question of the construction of the contract, and the defense of impossibility of performance has been sustained, not because contracts of hiring are not within the general rule, but because the terms of the particular contract were thought to withhold it from the rule. Dexter *v.* Norton (47 N. Y., 62).

In the case of Warth's Executrix *v.* Mack (51 U. S. Ap., 133) this court applied the rule to a contract of bailment, and held the promisor not to be released from performance by impossibility. Our decision proceeded upon the ground that it was inferable from the various provisions of the contract that the bailee was not to
382 be absolved in case of the destruction by fire without his fault of the subject of the bailment. In the present case the charterer not only explicitly undertook by the contract to return

the yacht at the expiration of the term of hiring in as good condition as at the beginning, "fair wear and tear from reasonable and proper use only excepted," but also explicitly undertook to be responsible for any loss or damage to any part of the vessel, her equipment and furniture, and also to secure the owner in a specified sum against all losses and damages which might occur to her. It is impossible to construe such a contract as contemplating that the loss of the yacht by *vis major* or inevitable accident should discharge the charterer from further liability. The case is one where the promisor must fulfill the terms of his promise, or respond in damages for a breach.

We are unable to agree with the court below that the libellant was entitled to recover only $65,000 as damages for the loss of the yacht. The charter contained this provision: "For the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000." It appears from the testimony in the record, and indeed the fact is one of which the court may take judicial notice, that the market value of yachts is a very uncertain quantity. These vessels, built for pleasure purposes and to suit the tastes and caprices of the original owner, seldom command approximately their real value when offered for sale in the market, and fluctuate in the estimation of purchasers with the notions and fashions of the day. As Captain Atkinson testifies, "A yacht has no value except a fancy valuation." It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is, in the absence of fraud or mutual mistake, conclusive upon them. The Providence & Stonington Steamship Co. *v.* The Phœnix Insurance Company (89 N. Y., 559); Hart *v.* Penn. R. R. Co. (112 U. S., 331); Graves *v.* Lake Shore R. R. Co. (137 Mass., 33); New
383 York, N. H. & Hart. R. R. *v.* Sayles (58 U. S. Ap., 18). Even in cases where the question arises whether a sum fixed in the contract as damages for a breach is to be treated as a penalty or as liquidated damages the courts treat it as liquidated damages when, considering the subject-matter and nature of the agreement and the difficulty of estimating exact damages, the intention of the parties to consider it as liquidated damages may be inferred.

The learned judge in the court below was of the opinion that the sum fixed was intended as the limit of the liability of the charterer for a breach of all the conditions of the contract including those of the payment of the charter hire. In reaching this conclusion he placed emphasis upon another condition of the charter providing that the liability of the charterer should "in no case exceed the sum of $75,000," and held that inasmuch as the charter hire, $10,000, had been paid by the charterer, the latter's liability did not exceed $65,000.

We think it was the meaning of the provision fixing the value of the yacht to fix it for the purpose of determining her value in case of her injury or destruction as the basis of damages, and that this was practically the only purpose contemplated by the provision. It surely was unnecessary to agree upon the value of the vessel with

any reference to the payment of the charter hire, or of demurrage for detention beyond the charter period, or for the fulfillment of any of the conditions in which the value of the vessel could not affect the amount of damages arising from the breach.

These conclusions require a modification of the decree in the court below. The cause is accordingly remitted to that court with instructions to decree for the libellant in the sum of $75,000 and interest from October 1, 1898. The libellant is entitled to the costs of this court.

Franklin Bartlett, for the respondent, appellant.
George Zabriskie, for the libellant, appellant.

384 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 13th day of April, one thousand nine hundred.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

WILLIAM L. MOORE, Libellant, Appellant,
vs.
SUN PRINTING & PUBLISHING ASSOCIATION, Respondent, Appellant.

Appeals from the district court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the district court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said district court be, and it hereby is, modified, and cause remanded to the district court with instructions to enter a decree for the libellant in the sum of $75,000 and interest from October 1, 1898, costs of this court to the libellant.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

W. J. W.
E. H. L.
N. S.

385 [Endorsed:] United States circuit court of appeals, second circuit. Wm. L. Moore *vs.* Sun P'nt'g & Pub. Ass'n. Order for mandate. United States circuit court of appeals, second circuit. Filed Apr. 17, 1900. Wm. Parkin, clerk.

386 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages numbered from 1 to 385, inclusive, contain a true and com-

plete transcript of the record and proceedings had in said court in the case of William L. Moore against Sun Printing & Publishing Association, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of April, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled.]

387 [Endorsed:] File No., 17,732. U. S. C. C. of appeals, 2nd circuit. Term No., 262. The Sun Printing and Publishing Association, petitioner, *vs.* William L. Moore. Filed April 30, 1900.

388 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which William L. Moore is appellant and The Sun Printing & Publishing Association is appellee, and The Sun Printing & Publishing Association is appellant and William L. Moore is appellee, which suit was removed into the said circuit court of appeals by virtue of appeals from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and

389 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifteenth day of May, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

390 [Endorsed:] Supreme Court of the United States, October term, 1899. No. 618. The Sun Printing and Publishing Association *vs.* William L. Moore. Writ of certiorari. United States circuit court of appeals, second circuit. Filed May 18, 1900. William Parkin, clerk.

391 United States Circuit Court of Appeals for the Second Circuit.

WILLIAM L. MOORE, Libellant, Appellant,
against
THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent, Appellant.

It is hereby stipulated that the certified copy of the transcript of record now on file in the Supreme Court of the United States shall be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on May 15th, 1900, in the case of The Sun Printing and Publishing Association against William L. Moore, No. 618, October term, 1899.

Dated New York, May 18th, 1900.

ZABRISKIE, BURRILL & MURRAY,
Proctors for Libellant.

FRANKLIN BARTLETT,
Proctor for Respondent.

Endorsed: U. S. circuit court of appeals. William L. Moore against The Sun Printing and Publishing Association. Stipulation. United States circuit court of appeals, second circuit. Filed May 19, 1900. William Parkin, clerk.

392 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, May 19, 1900.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 5, 19, 1900. W. P.]

393 [Endorsed:] United States circuit court of appeals, second circuit. William L. Moore *vs.* Sun Printing & Publishing Association. Return to writ of certiorari.

394 [Endorsed:] File No., 17,732. Supreme Court U. S., October term, 1900. Term No., 262. The Sun Printing & Publishing Association, petitioner, *vs.* Wm. L. Moore. Writ of certiorari and return. Filed May 25, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

EX PARTE THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Petitioner.

Petition for writ of certiorari requiring the United States Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court for its review and determination the case of William L. Moore, Libellant-Appellant, versus The Sun Printing and Publishing Association, Respondent-Appellant.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of The Sun Printing and Publishing Association, a corporation, by Paul Dana, its president, respectfully shows to this Honorable Court as follows:

I.—Your petitioner was, at all times in the years 1898, 1899 and 1900, and is now, a corporation duly incorporated under and by virtue of the laws of the State of New York, and its principal business was then and is now the printing and publication of two newspapers called *The Sun* and *The Evening Sun*.

II.—This is a cause in Admiralty, and it was begun by the filing of a libel *in personam* in the District Court of the United States for the Southern District of New York by William L. Moore, as owner of the steam yacht *Kanapaha*, against The Sun Printing and Publishing Association, claiming to recover the sum of seventy-five thousand dollars ($75,000), with interest from October 1, 1898, for the failure and neglect of the respondent to surrender and deliver said yacht to the libellant, and in that said yacht, while in the charge and control of the respondent, was wrecked, and is a total loss.

Twelfth paragraph of Libel, Transcript of Record, p. 7, fols. 26 and 27.

III.—The *Kanapaha* was an old steam-yacht. She was built in 1880, and, therefore, eighteen years before she was lost. During this period of eighteen years no substantial repairs had been made to the vessel with the exception of renewing her boilers. She was, therefore, an antiquated vessel, built before the modern improvements in yacht building, and she was destitute of all such improvements. She had no electric lighting plant, no ice plant or refrigerating plant, all of which are essential features of modern yachts of her size. She had no new fittings of any kind. Everything about her was old. Her speed was low—about eleven or twelve knots an hour—while her consumption of coal was large, as might be expected from the date at which her engines were built. In short, she was an old boat, and of an old-fashioned type. It can be shown that her original cost at Cramps' was $59,000, and that she was sold four years later for $50,000. But these facts as to original cost are immaterial, because it was proven by uncontradicted evidence that her value in the summer of 1898 was not more than $30,000.

See testimony of Stephen B. Atkinson, Master, *Transcript of Record*, pp. 142, 143, 144; fols. 567–569; 571–574; pp. 146, 147, fols. 583–586.

IV.—In the month of March, 1898, an agreement was made between Chester S. Lord, the managing editor of *The Sun*, one of the newspapers published by the defendant corporation, and Thomas Manning, the agent for William L. Moore, the owner of the yacht *Kanapaha* and the libellant in this action, by which it was agreed in substance that Mr. Lord should hire the yacht for two months from April 1st, for the sum of $5,000. The stipulated price was duly paid, and the yacht was turned over to Mr. Lord. Before the expiration of the term for which the yacht was hired, a new agreement was entered into between the same parties on the 14th day of May, 1898, for a further letting of the yacht for the term of four months from June 1st to October 1st, for the sum of $10,000. The terms of this agreement, except as to the period of hiring and compensation, were identical with those of the previous agreement. There were two instruments, one in the nature of a charter-party, and the other in the nature of an agreement of suretyship, and it is upon these instruments that the present action is brought.

The alleged charter-party, which is printed as Libellant's Exhibit 4, reads:

"MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore of the City of New York, by Thomas Manning his Agent, party of the first part, hereinafter called the Owner, and Chester S. Lord of the City of New York, party of the second part, hereinafter called the Hirer.

WITNESSETH:

That the said William L. Moore being the owner of the steam yacht *Kanapaha* enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the Hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of four months from the first day of June expiring on the first day of October now next ensuing for the sum of Ten Thousand Dollars ($10,000.00) payable on the signing of this agreement.

That the Hirer will carry out the provisions of

the charter-party made on the first day of April last and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses including amongst other things, uniforms, wages, provisions, pilotage, tonnage, light house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract, to the Owner or his agent, at Manning's Basin. foot Twenty-sixth street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of Seventy-five thousand dollars ($75,000) and the said hirer shall procure security or guarantee to and for the owner in the sum of Seventy-five thousand dollars ($75,000) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the Hirer to return and surrender the said yacht to the Owner as hereinbefore provided, the Hirer shall be charged demurrage and shall pay demurrage to the Owner at the rate of Five Hundred Dollars ($500.00) per day for each and every day's detention.

The Hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

That the Hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
CHESTER S. LORD,
For The Sun Printing and Publishing Association."

Transcript of Record, pp. 334–335; fols. 1333–1339.

The agreement of suretyship, Libellant's Exhibit 5, executed by Mr. Lord at the same time, reads as follows:

WHEREAS BY AGREEMENT or charter-party dated May 14th, 1898, William L. Moore of the City of New York, hereinafter called the Owner, did or is about to hire or charter unto Chester S. Lord of the City of New York, hereinafter called the Hirer, the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club as will more fully and at large appear by a copy of said agreement or charter-party hereunto annexed and hereby made part hereof.

NOW AT THE REQUEST of the said Hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said Owner received, and receipt whereof is hereby acknowledged.

WE, The Sun Printing and Publishing Company, of the City of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship.

FIRST, that the said Hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

SECOND, that we expressly waive and dispense with notice of any demand, suit or action at law against the Hirer and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the Hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

THIRD, that our liability hereunto shall in no case exceed the sum of Seventy-five Thousand Dollars ($75,000.00).

IN WITNESS WHEREOF we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the Managing Editor of The Sun Printing & Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed.

A. H. BRADLEY,
Notary Public,
New York.

[SEAL.]

Transcript of Record, pp. 335-336; fols. 1340-1344.

It will be noticed that the above instruments are inartificially drawn and in some respects contradictory.

Subsequently to the execution of the two instruments, the sum stipulated to be paid for the hire of the yacht, to wit, $10,000, was paid on May 16, 1898.

"The charter hire of $10,000, as the evidence shows, was paid by *The Sun's* check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16th."

Opinion of Judge Brown, Transcript of Record, p. 355, fol. 1419.

V.—The respondent-appellant, The Sun Printing and Publishing Association, is a corporation engaged in the business of publishing two newspapers. Its governing body at this time was a Board of Trustees composed of four persons—Paul Dana, the

president; Thomas Hitchcock, the secretary; William M. Laffan, the general manager, and Franklin Bartlett. Neither as a board nor individually did any of these persons take any part in the making or execution of these agreements. The record fails to show any knowledge on their part of the execution of such agreements. It fails to show any authority in the managing editor of the newspaper to make such agreements. It fails to show any act of ratification, formal or informal, on the part of such Board of Trustees of the particular terms of the agreements. It shows that the stipulated sum of money for the hire of the boat was paid out of the funds of the corporation; that the employees of the corporation had the use of the boat, and that the corporation paid its running expenses as well as some insurance premiums. Beyond this the record shows nothing. The numerous and onerous stipulations contained in the instrument signed by Mr. Lord, the managing editor, were absolutely unknown to the corporation, and, of course, were not acted upon.

VI.—The yacht went ashore on the night of September 5, 1898, near the coast of Cuba, on a reef not shown on the latest United States charts issued prior to her sailing, with which the vessel had been furnished. She became a total loss. The yacht having been lost as above stated, the covenant for her redelivery at the expiration of the term became impossible of fulfillment. The term for which she was hired expired on October 1st. The defendant had, at this time, no insurance upon the vessel.

The immediate cause of the stranding of the vessel was the extinguishing by the Spaniards of two conspicuous and important lights at the entrance of the harbor of Nuevitas, which formed the ordinary and indispensable guide to navigation at night in those waters. These lighthouses are thus described in the official publications of the Hydrographic Office:

"The Light House on Maternillos Point is 170 feet high, white, with the word Colon painted on it, and

exhibits, 174 feet above the sea, a fixed and flashing white light every 48 seconds, duration of flash 5 seconds. The light should be visible 17 miles."

The other extinguished light called the Eastern Point light, situated on Barlovento or Pilot Point, is thus described:

"On Barlovento or Pilot Point, the east side of the entrance, is a quadrangular building painted yellow, and a white mast stands in the middle of it, from which is exhibited, 48 feet above the sea, a white light visible 9 miles."

And we also find the following statement:

"The entrance of the harbor may be recognized by the Maternillos lighthouse, by three small hills on the south side of the harbor, and by three islets in the harbor called Los Ballenatos, a little higher than the surrounding land. Also on the east side of the entrance is a quadrangular building painted yellow, surmounted by a white mast, from which is shown a light."

Libellant's Exhibit No. 21.

Transcript of Record, pp. 344–345; fols. 1373, 1378–1380.

The master testified:

"I had been informed that the lights on the north side of Cuba had been relit and were burning" and that "the stranding would have been avoided" if the light had been burning.

Transcript of Record, pp. 133–136; fols. 532, 533, 536–539, 541–544.

The above evidence showing that the loss of the yacht was caused by no want of skill in navigation and by no fault on the part of the vessel, was evidently not considered by the trial Court in making its decision, the defendant being held liable entirely apart from any question of the care used in the navigation of the vessel.

VII.—The cause came on for trial in the United States District Court for the Southern District of New York, before Judge Addison Brown, on April 14, 1898.

Transcript of Record, p. 35, fols. 137–138.

Upon the trial before Judge Brown the Court expressly refused to consider auy and all evidence as to the value of the yacht, and as to the amount of the loss and damage which the libellant had sustained by reason of her destruction. The Court stated in reference to a motion to strike out evidence from the deposition of Captain Atkinson on the subject of the value of the vessel:

"I shall strike out nothing from the deposition. I will note that on this hearing no evidence as to damages will be considered, that all such evidence is to be reserved for hereafter."

* * * * * * *

"I rule that all the evidence in Captain Atkinson's deposition relating to damages is not considered as received upon this present hearing, but that that evidence and all other evidence on damage is reserved for future consideration in case any decree should be found for the libellant."

Transcript of Record, p. 281, fols. 1123, 1124.

And agaid the Court said:

"No evidence on the question of damages is considered at this time."

Mr. Hughes: We understand that that includes the evidence as to the value of the yacht?

The Court: Of course."

Transcript of Record, p. 282, fol. 1125.

No further opportunity was given to introduce evidence on the subject of value, and it is evident from from the opinion of the Court that such evidence was not considered.

VIII.—By the final decree it was

"Ordered, adjudged and decreed, that the libellant recover from the respondent the sum of sixty-five thousand dollars ($65,000), with interest thereon from October 1, 1898, amounting to three thousand four hundred and eighty-eight $\frac{34}{100}$ dollars ($3,488.34) together with the sum of one hundred and forty-one $\frac{03}{100}$ dollars ($141.03) for his costs and disbursements as adjusted, amounting in all to the sum of sixty-eight thousand six hundred and twenty-nine $\frac{37}{100}$ dollars ($68,629.37)."

Transcript of Record, pp. 358, 359, fols. 1432, 1433.

It appears from the opinion (*Transcript of Record*, pp. 354–357, fols. 1425–1428), that the amount of the damage was arrived at by taking the figure $75,000 named in the old charter-party, and deducting therefrom the sum of $10,000, which was the amount of the charter hire. The Court expressly states in reference to the $75,000 clause: "This means, I think, the value (of the yacht) at the beginning of the charter period."

Transcript of Record, p. 356, fol. 1421.

The evidence, therefore, as to the actual value, and consequently as to the actual loss, was entirely disregarded. and the determination of the damages was arrived at by taking the figure named in the instrument as a starting point.

It is contended on the part of the petitioner that assuming the agreement of suretyship to be binding upon it, it was an agreement only to secure the loss and damage "which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of the contract,"—in other words, an agreement to pay *actual* loss or damage to the boat and *actual* loss or damage to the owner from non-performance

of covenants; that the sum of $75,000 mentioned therein must be regarded as in the nature of a penalty in the bond and not of liquidated damages; and that by reason of these facts, assuming that a liability existed at all, it should be measured by evidence of actual loss, or in the case of the destruction of the vessel and failure to return it, by the *actual value* of the vessel.

The effect of any other interpretation is to make this respondent pay either $75,000, or, according to the trial Court, $65,000, for the loss of a boat eighteen years old, whose value, according to the rejected evidence, was stated to be $30,000—in other words, to pay from thirty-five to forty-five thousand dollars more than her value. Such an injustice resulting from an incorrect enunciation of the law, merits the attention of the highest tribunal, not only in the importance of the principle which the Court has disregarded, but in the excessive hardship of the result and the magnitude of the sum which the respondent is called upon to pay.

IX.—On the question of the ratification by the defendant of the acts of Lord, Judge Brown held that the circumstances "leave no doubt of the ratification by the defendant of Mr. Lord's acts, equivalent to an original authority."

Transcript of Record, p. 354, fol. 1414.

It is contended by your petitioner that the only ratification, if any, which can be predicated on the act of the defendant, extended to the mere user of the vessel, and that assuming that the amount named, $75,000, is to be regarded as liquidated damages, there was no ratification of this and other oppressive terms of Lord's contracts, as there can be no ratification without knowledge.

X.—From the final decree and judgment of the District Court the respondent duly appealed to the United States Circuit Court of Appeals for the Sec-

ond Circuit. The libellant also appealed from the decision, in that it reduced the alleged contract liability by the deduction of $10,000 from the sum of $75,000 mentioned in the contract.

Transcript of Record, pp. 359, 360, fols. 1435–1437.

The appeal to the United States Circuit Court of Appeals for the Second Circuit was argued before said Court, consisting of Judges Wallace, Lacombe and Shipman, on the 9th and 12th days of March, 1900, and on the 3d day of April, 1900, the said Court handed down an opinion holding that the Trial Court erred in awarding the libellant only $65,000 as damages for the loss of the yacht, and modifying the decree of the Court below by adding $10,000 to the sum already found against the respondent, and instructing the Court below to decree for the libellant in the sum of $75,000 and interest from October 1, 1898, together with the costs of the Appellate Court.

The decree of the United States Circuit Court of Appeals herein was signed on the 17th day of April, 1900, and the mandate of said Court to the District Court was thereupon issued.

XI.—As appears from its opinion, the Appellate Court held with the Trial Court on the question of ratification.

Upon the argument it was "insisted for the charterer that the yacht perished without any fault on the part of those who were navigating her, and consequently that the case is one for the application of the principle well settled in the law of bailments, that the hirer is absolved from further obligation where the hired thing is destroyed without his fault, so that redelivery to the bailor is impossible," and the case of *Young* v. *Leary* (135 N. Y., 569), was relied on in support of this contention. The Appellate Court, as appears by its opinion, admitted that such was the effect of the case cited, but overruled it on the authority of certain Massachusetts cases

(Opinion, p. 5), and decided that the hirer was liable notwithstanding the destruction of the vessel and the consequent impossibility of its redelivery.

Upon the question whether the amount named in the instrument, namely, $75,000, should be considered as liquidated damages or as a penalty, the Court entirely disregarded the principle, repeatedly approved by the highest State courts and by the Circuit Courts of Appeals, as well as by many English decisions, that even though a sum is expressly stated in a contract to be liquidated damages, the Courts will disregard such a statement where the amount named is disproportionate to the presumable or probable loss, and will hold that the intention of the parties, notwithstanding the express language used, was to make the sum named a penalty.

The Court further held apparently as matter of law, that it is impossible to ascertain the value of a yacht, stating that the Court "may take judicial notice that the market value of yachts is a very uncertain quantity" (*Opinion*, p. 6).

It is contended that this erroneous statement of the law, involving a principle of the gravest importance, not only has the effect of increasing the liability of the respondent, assuming that there is a liability, by some $40,000, but it has also the effect of setting up the authority of one of the Circuit Courts of Appeals for an erroneous exposition of the law, of throwing into confusion the decisions of those courts, by reason of a divergence in their opinions, and hence of calling for the interposition of a final tribunal to determine between them, thereby fulfilling the purpose of the statutory provision with reference to the granting of the writ of *certiorari*.

Finally, upon the question decided by the trial Court, that assuming $75,000 to be the limit of liability, this amount should be reduced by the hire of the yacht, namely, $10,000, already paid by the defendant, the Appellate Court overruled the District Court by fixing the amount of the judgment at

$75,000, compelling the charterer to pay altogether the sum of $85,000, when its liability had been expressly limited to $75,000 by the agreement upon which this action was brought.

It appears from the opinion (*Transcript of Record*, pp. 355-357, fols. 1417-1428) that the Court below based its determination of the amount of the judgment upon the fact that the sum of $75,000 named in the two instruments was a "security or guarantee to the owner in the sum of $75,000 against any and all loss and damage which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms or conditions of this contract."

One of these terms or conditions was the covenant to pay the hire of the yacht, namely $10,000, which sum was actually paid by the respondent, subsequently to the execution of the agreements, by which payment, in the language of the trial Judge, "so much of its obligation of $75,000 has, therefore, been discharged by the *The Sun*" (*Transcript of Record*, p. 355, fol. 1419). The opinion also refers to "the express provision of the second instrument, called the agreement of suretyship," "that in no case shall the liability of *The Sun* exceed the sum of $75,000," and says: "Even if the two agreements be regarded as virtually one, as it would seem they must be, still this latter clause must control the general expressions preceding; and this leaves, after *The Sun's* payment of $10,000 for the charter hire, but $65,000 principal as the limit of any further obligation on its part."

Transcript of Record, p. 355, fols. 1419, 1420.

It is contended on the part of the petitioner that, assuming the agreement of suretyship to be binding upon it, and that the sum of $75,000 is to be regarded as liquidated damages, both of which are denied, yet the trial Court was right in reducing the amount

by $10,000, which the respondent had already paid in fulfillment of the liability covered by its bond; that the total liability of the respondent could not exceed the sum of $75,000; that by reason of these facts, assuming that a liability existed at all, in measuring which the evidence of actual loss, or in other words, of the actual value of the vessel was to be disregarded—assuming, in short, that every other point was decided against *The Sun*,—its liability could in no case exceed the sum of $75,000, and that any payment made by the respondent in satisfaction of its liability to the libellant, under the charter-party and the contract of suretyship, was to that extent a discharge of its entire obligation, which was in no case to exceed the sum of $75,000, and finally, that the trial Court was, therefore, correct in deducting from the total liability the sum of $10,000, which was the amount paid for the hire of the vessel.

XII.—All proceedings on the part of the libellant herein have been stayed by order of Judge Brown of the said District Court for the purpose of enabling your petitioner to apply to the Supreme Court of the United States for the writ of *certiorari* now applied for.

XIII.—A certified copy of the entire record of this cause in the said United States Circuit Court of Appeals is herewith furnished, and is hereunto annexed in accordance with Rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeals, and the same is marked Exhibit "A."

XIV.—Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in this cause is erroneous, and that this Honorable Court should require this case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled "An Act to establish Circuit Courts of Ap-

peals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

XV.—The importance and gravity of this cause to your petitioner will be recognized from the fact that through the decree of the United States Circuit Court of Appeals your petitioner will be compelled to pay to the libellant for its failure to redeliver the yacht the sum of seventy-eight thousand dollars ($78,000), more than double the market value of the wrecked vessel according to the undisputed evidence.

Your petitioner respectfully claims:

FIRST.—That as the charter-party herein provided for the delivery of the vessel at the port of New York in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, the destruction of the yacht or the thing hired, without your petitioner's fault, pending the continuance of the contract, relieved your petitioner from the obligation.

SECOND.—That if your petitioner is liable in any amount, it is liable to the libellant only for the fair market value of the yacht at the time of its destruction, and that the sum of seventy-five thousand dollars ($75,000) mentioned in the charter-party and in the agreement of suretyship, is to be regarded as a penalty, and not as liquidated damages.

THIRD.—That the charter-party and agreement of suretyship were never authorized or ratified by the defendant corporation, and that all that was ratified was the hiring or user of the yacht, and not the extraordinary and oppressive provisions of the instruments as to which the minds of the libellant and the defendant corporation never met.

FOURTH.—That in any case the liability of the defendant under the two instruments in question was expressly limited to $75,000, and if its liability should be found to equal this amount, the judgment herein should be reduced by the sum of $10,000 already paid under the charter-party.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled William L. Moore, Libellant-Appellant, *versus* The Sun Printing and Publishing Association, Respondent-Appellant, number 123, to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
By PAUL DANA,
President.

FRANKLIN BARTLETT,
Attorney and Counsel for Petitioner.

We certify that in our opinion the above petition is well grounded in matter of law, and proper to be heard.

JAMES RUSSELL SOLEY,
FRANKLIN BARTLETT,
Of Counsel for Petitioner.

STATE OF NEW YORK,
Southern District of New York, } ss.:
County of New York,

PAUL DANA, being duly sworn, says: That he is the President of The Sun Printing and Publishing Association, the petitioner above named; that he has read the said petition by him subscribed; and that the facts therein stated are true to the best of his information and belief.

PAUL DANA.

Sworn to and subscribed before me this 28th day of April, 1900.

A. H. BRADLEY,
Notary Public,
N. Y. Co.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

EX PARTE THE SUN PRINTING AND PUBLISHING ASSOCIATION,

Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI.

The facts of the case are stated in the petition. Here it is only necessary to dwell upon such of these facts, together with the proceedings in the Courts below, as have a bearing upon the question of the issue of the writ.

The granting of the application for a writ of *certiorari* being entirely within the discretion of the Court no fixed rules can be stated to determine its decision; but from the cases may be gathered suggestions that the power to bring up a record for review in the Supreme Court might well be exercised in cases where a divergence of opinion might occur in some of the nine appellate tribunals of equal rank created by the Act of March 3, 1891.

The necessity of avoiding conflict between courts of appeal and the courts of a State has also been referred to as an important consideration (*Forsyth* v. *Hammond*, 166 U. S., 506). In that case a conflict between the decision of the Circuit Court of Appeals

for the Seventh Circuit and the Supreme Court of the State of Indiana was one of the grounds for the issue of the writ.

The importance of the question involved is also suggested as one of the guiding considerations in this case, and the fact that the decision reached by the appellate court has involved a reversal of the court below is another circumstance to which attention is directed (*American Construction Co.* v. *Jacksonville R. R.*, 148 U. S., 372, citing the case of *Fabre, Petitioner*, No. 1237). This last was an admiralty case which presented an important question as to the rules of navigation.

It may, therefore, be said that while no general rule limits the discretion of the Court in this matter, yet the decision would be largely influenced towards granting the writ where the question of law presented was of great importance, where a difference of opinion between Circuit Courts of Appeal was involved, or a difference of opinion between a Circuit Court of Appeal and a State court, or where a division of opinion between the Judges below was indicated by a reversal or a modification of the judgment in the trial court.

All these considerations are present in the case at bar. We submit that upon the important principles governing the question whether a sum stipulated in a contract as liquidated damages shall be so regarded, or whether it shall be treated as a mere penalty, there is a variance between the decision of the Circuit Court of Appeals for the Second Circuit in the present case, and at least one other decision of the Circuit Court of Appeals for the Fourth Circuit (*Gay Mfg. Co.* v. *Camp*, 13 C. C. A., 137), and also a variance between the first mentioned court and the Court of Appeals of the State of New York; that the question is one of great gravity and importance as a question of law, as well as involving a very large sum—between forty and fifty thousand dollars—in the present case; that by reason of this fact, the judgment is one of extraordinary harshness and great

injustice; that a grave error was committed by the Court below in refusing to consider evidence as to the actual loss sustained by the libellant and in measuring the damages solely by the sum named in the alleged contracts of the parties; that the sum so named must be regarded solely as a penalty and as the maximum limit of liability of the respondent; and that the Circuit Court of Appeals further erred in modifying the judgment rendered in the District Court so as to increase the liability. The other grounds are fully stated in the course of this brief.

The agreements upon which the recovery is based consisted of an alleged charter-party and a so-called contract of suretyship. The alleged charter-party, printed as *Libellant's Exhibit 4*, is as follows:

"MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore of the City of New York, by Thomas Manning his Agent, party of the first part, hereinafter called the Owner, and Chester S. Lord of the City of New York, party of the second part, hereinafter called the Hirer.

WITNESSETH:

That the said William L. Moore being the owner of the steam yacht *Kanapaha* enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the Hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of four months from the first day of June expiring on the first day of October now next ensuing for the sum of Ten Thousand Dollars ($10,000.00) payable on the signing of this agreement.

That the Hirer will carry out the provisions of the charter-party made on the first day of April last and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses including amongst other things, uniforms, wages, provisions, pilotage, tonnage, light house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract, to the owner or his agent, at Manning's

Basin, foot of Twenty-sixth street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigation of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of Seventy-five thousand dollars ($75,000) and the said hirer shall procure security or guarantee to and for the owner in the sum of Seventy-five thousand dollars ($75,000) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms and conditions of this contract.

That in the event of the failure of the Hirer to return and surrender the said yacht to the Owner as hereinbefore provided, the Hirer shall be charged demurrage and shall pay demurrage to the Owner at the rate of Five Hundred Dollars ($500.00) per day for each and every day's detention.

The Hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

That the Hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
CHESTER S. LORD,
For the Sun Printing and Publishing Association."

Transcript of Record, pp. 334–335; fols. 1333–1339.

The so-called agreement of suretyship (*Libellant's Exhibit* 5), executed by Mr. Lord at the same time, is as follows:

WHEREAS BY AGREEMENT or charter-party dated May 14th, 1898, William L. Moore, of the City of New York, hereinafter called the Owner, did or is about to hire or charter unto Chester S. Lord of the City of New York, hereinafter called the Hirer, the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club as will more fully and at large appear by a copy of said agreement or charter-party hereunto annexed and hereby made part hereof.

NOW AT THE REQUEST of the said Hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged.

WE, The Sun Printing and Publishing Company, of the City of New York, for ourselves and each of us, our successor or sucessors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship.

FIRST, that the said Hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

SECOND, That we expressly waive and dispense with notice of any demand, suit or action at law against the Hirer and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the Hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

THIRD, That our liability hereunto shall in no case exceed the sum of Seventy-five Thousand Dollars ($75,000).

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the Managing Editor of The Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed.

A. H. BRADLEY,
[SEAL.] Notary Public,
New York.

Transcript of Record, pp. 335-336; fols. 1340-1344.

It will be observed that the above agreements are inartificially drawn; that their provisions are in some respects obscure, and in others contradictory; that while it was apparently contemplated in the alleged charter-party that the so-called agreement of suretyship or guarantee should be executed by a party other than the party to the first agreement, it was in fact executed by the same individual, under the same designation; and they must, as the trial Court stated, be read together, so far as they can be.

Under these circumstances, and especially in view of the laxity in the construction of the agreements, the principle that courts of law must apply in construing a stipulation for liquidated damages as a penalty finds an additional justification.

Assuming that these instruments create any liability in this respondent, it is a liability upon a *quasi* agreement of indemnity, for actual loss and damage which may be sustained by the owner by reason of loss or damage to the boat and its belongings, and by reason of the breach of any of the terms of the contract. In such a case the sum named in the bond is regarded simply as a penalty, to which the total liability, ascertained from evidence of actual loss, is restricted.

An attempt is made in the contract to prescribe or liquidate the damages for the loss of the boat. The phrase "liquidated damages" is not used, but the

purport of the clause in regard to "the value of the yacht" is *merely a disguised stipulation for liquidated damages.* It was contended by the libellant that this was a valued policy of insurance; but this contention was itself rejected by Judge Brown at the trial, who said (*Transcript of Record*, p. 357, fol. 1428):

> "The valuation clause in marine policies of insurance is not analogous, I think, to this charter. In such policies that clause has reference to a single object, namely, the rights of the parties upon a loss by sea peril. In this charter its object was to determine also the amount of security, which was designed to cover and does cover a multitude of particulars, as well as the important obligation to pay the charter hire."

The trial Judge is evidently correct in this statement. This is not a valued policy of marine insurance. It is really an agreement of indemnity to secure the performance of certain covenants, limited in amount to $75,000, and the attempt has been made to state that this sum shall be the liquidated damages in case of failure to redeliver.

The opinion of Judge Wallace takes substantially the same view of this clause. He says (p. 7):

> "We think it was the meaning of the provision fixing the value of the yacht to fix it for the purpose of determining her value in case of her injury or destruction as the basis of damages, etc."

In other words, it is merely an ordinary provision for liquidated damages, in case of injury or destruction.

The alleged charter-party provides that the hirer shall procure security in the sum of $75,000, against what?

FIRST.—To secure any and all losses and damages which may occur to said boat or its belongings which may occur to said boat

(*a.*) by reason of such loss or damage, and

(*b.*) by reason of the breach of any of the terms or conditions of this contract.

This language certainly describes an ordinary agreement of suretyship with the sum of $75,000 as the penalty. The language could hardly be more explicit in confining the liability to actual loss and damage. It is to secure "any and all losses and damages *which may occur* to said boat," that is to say, actual losses and damages. It is "to secure any and all losses and damages which may be sustained by the owner by reason of such loss or damage." Here, again, it is actual loss and damage that is referred to.

Again, when reference is made to a breach of the terms and conditions of the contract, what is the bond to secure? It is to secure "any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner * * * by reason of the breach of any of the terms or conditions of this contract." In this case also, where the loss or damage arises from breach of the terms of the contract, it is confined to actual loss and damage.

The apparent object of the whole agreement is to make a bond with a penalty covering all forms of actual loss which the owner may sustain either by reason of loss or damage to the yacht or by reason of breach of the conditions of the contract.

I.

The Circuit Court of Appeals committed a fatal error in holding that the sum named in the two contracts, to wit, $75,000, was to be regarded

not as a penalty, but as liquidated damages; that for that reason judgment must be given for that amount, and that evidence of actual value, and therefore of actual loss or damage, was not to be considered.

The general principle in reference to the question whether a sum to be paid for the non-performance of an agreement is to be considered as a penalty or as liquidated damages, is stated thus by Mr. Chief Justice Marshall:

> "In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is, to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not of course be considered as liquidated damages; and it will be incumbent on the party who claims them as such, to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention."
>
> *Tayloe* v. *Sandiford*, 7 Wheaton, 13 (at p. 17).

The powers of courts in this respect have thus been stated by the New York Court of Appeals:

> "Courts have felt embarrassed, when called upon to enforce inequitable, harsh or oppressive provisions in contracts, inserted often without reflection or a full knowledge of their legal effect, by a laudable desire to harmonize the abstract principles of right and justice with the established legal rules that parties are at liberty to make contracts for

> themselves, and that it is the duty of courts to enforce them as made. By a liberal use of the element of supposed intention they have been enabled to do so to a reasonable extent, and yet a reference to a few of the numerous authorities will illustrate the difficulties experienced in this respect (9 N. Y., 551; 21 *Id.*, 253; 1 *Id.*, 450; 5 Cow., 144, note *b*.; 3 J. Cas., 297; 22 Wend., 201; 2 T. R., 32; 11 Ind., 70; 8 Mass., 223; 5 Allen, 304; 13 Wend., 588; 12 Barb., 366; 17 *Id.*, 260; 15 Abb. Pr., 273; 38 N. Y., 74; 6 East., 529; 3 Par. on Con., 156). For the purposes of this case, we must regard the provision as a penalty.
>
> *Noyes et al.* v. *Phillips*, 60 N. Y., 411.

The opinion of the Circuit Court of Appeals (pp. 6-7) holds, in substance, that the sum named in the contract, namely, $75,000, must be regarded as liquidated damages, and that the question of actual value of the property destroyed is to be disregarded.

The magnitude of this error is shown by the fact that it was proved by uncontradicted evidence, although the trial Court refused to consider it, that the value of the yacht in the summer of 1898 was not more than $30,000. It thus appears that, by this decision, the respondent is required to pay for a boat eighteen years old and of antiquated type a sum $45,000 in excess of what is proved to be her actual value.

This conclusion is reached by the learned Court of Appeals expressly upon the ground that the parties have stipulated as to the amount which shall be considered as liquidated damages. The Court would necessarily have reached the same conclusion, under its reasoning, if the amount at which the liquidated damages had been placed had been five hundred thousand or a million dollars, for it held that:

> "It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is,

in the absence of fraud or mutual mistake, conclusive upon them" (*Opinion*, p. 7).

We contend that the true rule of law, as set forth by all the highest authorities is precisely the reverse, and that the naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that *if the amount is disproportionate to the loss*, the Court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though specifically stated to be liquidated damages.

This principle is stated with great fullness and force by the Circuit Court of Appeals of the Fourth Circuit (1895) in *Gay Manufacturing Co.* v. *Camp*, 13 C. C. A. Reps., 137, at pp. 141 *et seq.* In this case a lease had been made by the Receivers of the plaintiff to the defendant of certain mill property at Suffolk, Va., at a rental of $10,000 per annum. The lease stipulated that in case of a breach by the lessees "in lieu of all such claim for loss or damage, the sum of five thousand dollars is now hereby estimated, assessed and accepted between the parties hereto *as liquidated damages* to be paid by the parties of the second part unto the party of the first part which the parties of the second part hereby declare to be due and promise and bind themselves to pay unto said party of the first part or its assigns immediately upon the termination or annulment or declaration of the termination or annulment of this contract by the party of the first part," &c.

It will be observed that no language could be more specific than this. The sum of five thousand dollars is stated to be "estimated, assessed and accepted between the parties hereto as liquidated damages." Not only that, but it is a sum "which the parties of the second part hereby declare to be due and promise and bind themselves to pay" upon the arising of the condition. The designation of liquidated damages

and the express promise to pay the sum named could not be made more explicit.

Before the expiration of the term the lessees defaulted in the rent, and on this default the lessors entered. Subsequently the amount of the rent due, which was about twenty-five hundred dollars, was paid. The question arose, as stated by the Court, "Are the lessors entitled to the payment of $5,000 as liquidated damages, under these circumstances?" As to this the Court said:

> "This will depend upon the question, Is the sum of $5,000 inserted as a penalty or as liquidated damages? 'Upon this subject,' says Deady, *J.*, in *Harris* v. *Miller*, 6 Sawy., 311; 11 Fed., 118, 'the law is peculiar, *and instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.*'
>
> "In *Spencer* v. *Tilden*, 5 Cow., 150, the Court says: 'This doctrine, *which converts damages apparently stipulated or fixed by the parties into a penalty*, came from the civil law, through the Court of Chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, *Courts must disregard the particular expressions of the parties*, for the moment we agree that a party may by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specified default, secure the whole to himself without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases, and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal.'
>
> "The rule laid down in *Barton* v. *Glover*,

Holt, N. P., 43, is: 'When a sum of money, whether in the name of a penalty or otherwise, *is introduced in a covenant* or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed or contract, and the penalty as the accessory, and therefore only to secure the damages really incurred.'

"The fact that the parties speak of it as liquidated damages is not conclusive. *Lampman* v. *Cochran*, 16 N. Y., 275. The doctrine is well stated by Sanford, *J.*, in *Bagley* v. *Peddie*, 5 Sandf., 192.'" (Here follow the rules laid down in the last cited case.)

"The principle derived from this quotation is that the circumstances of each case determine whether the sum stated be liquidated damages or a penalty; *and this without regard to the words used, perhaps sometimes in disregard of the intent of the parties;* and whenever it appears that the damages occasioned are easily estimated in money, the covenant is construed as a penalty. * * * 'The subject matter of the contract and the intention of the parties are the controlling guides. If from the nature of the agreement it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed to. But if, on the other hand, the contract is such that the strict construction of the phraseology *would work absurdity or oppression*, the use of the term "liquidated damages" will not prevent the Court from inquiring into the actual injury sustained, and doing justice between the parties' (2 *Sedg. Damages*, 215 (399, 400); 1 *Pomeroy Eq. Jur.*, Secs. 433, 444.) * * * It is quite impossible for any substantial damage to have resulted from the annulling of the lease a few days before the expiration of its term, and the exaction of a penalty of $5,000 as the consequence of such a default would be grossly excessive and inequitable. The judgment of the Circuit Court is affirmed, with costs."

It is submitted that there is a direct contradiction between the principle of law as laid down by the Circuit Court of Appeals in the case at bar and that enunciated in the case of the *Gay Manufacturing Co.*, last cited. There is little doubt that the Court which rendered the decision in the Gay case would have reached the conclusion in the present case that any stipulation requiring the payment of $75,000 as damages for the loss or non-delivery of an antiquated boat eighteen years old, which, according to the evidence, was not worth more than $30,000, was absurd and oppressive, would have relieved the respondent from its operation, supposing that it provided for so disproportionate an amount of damages, and would have admitted and considered and have reached a decision upon evidence of the actual loss and damage.

A petition for a rehearing in this case was denied at the Circuit Court of Appeals, before a court consisting of the Chief Justice and Goff and Simonton, *JJ.* It has therefore been concurred in by five Judges.

> Gay Mfg. Co. *v.* Bell, 25 U. S. App., 376.

Equally clear and forcible is the statement of the principle in the case of *Ward* v. *The Hudson River Building Company*, 125 N. Y., 230 (decided in 1891 by the New York Court of Appeals). In this case plaintiff had contracted to build four houses by a certain date, and that he should "pay to the owner ten dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated damages." After the default had continued for a considerable time, a new agreement was made, as follows:

> "It is mutually agreed that the sum, or penalty, due under said contract on March 25, 1888, shall be $1,540 by way of liquidated damages, unless four villas and all extra work are then entirely finished" (p. 233),

and the contract then contained the following further agreement:

> "It is further mutually agreed that in case said Ward fails to complete said villas on or before said 25th day of March, 1888, as aforesaid, there shall be due and owing to said Hudson River Building Company. its successors or assigns, the sum of $1,540 by way of liquidated damages, etc." (p. 232):

and there we find the rule laid down by Judge GRAY as follows:

> "Whether the sum agreed between parties to be paid, in the event of a breach of some agreement is termed by them a 'penalty,' or 'liquidated damages,' is not controlling upon the question of construction. Their use of such words is not always conclusive as to their legal meaning. To get at that we must consider the subject matter and nature of the agreement and understand clearly the intention of the parties. If it shall then appear that the damage and loss which may be presumed to result from non-performance are uncertain and incapable of exact ascertainment, then the payment or liabiliy fixed by them must be deemed to be liquidated damages and recoverable as such. *Where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportionate to the presumable or probable damage or to a readily ascertainable loss, the Courts will treat it as a penalty and will relieve on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance.* This subject has been reviewed in very many opinions; to a few of the more interesting of which, in the English reports, and in those of our State, I direct attention.
>
> In *Lowe* v. *Peers* (4 Burr., 2228, 2229), Lord Mansfield, and in *Kemble* v. *Farren* (6 Bing., 141), Tindal, *C. J.*, discuss the subject. In *Dakin* v. *Williams* (17 Wend., 447, and 22 *Id.*, 201), Nelson, *Ch. J.*, in the first report, and Chancellor Walworth, in the second, re-

view the question in the light of the English and New York cases (see also *Hosmer* v. *True*, 19 Barb., 106; *Dampman* v. *Cochran*, 16 N. Y., 275; *Clement* v. *Cash*, 21 *Id.*, 253; *Little* v. *Banks*, 85 *Id.*, 258)."

The principle is here again distinctly stated that, notwithstanding a sum *has been stipulated as a payment for non-performance by the defaulting party*, if it is disproportionate to the presumable damage or loss, the Courts will treat it as a penalty.

In the present case, the Court not only refused to consider the question whether the amount stipulated was disproportionate, but they actually refused to consider any evidence from which the amount of presumable or probable loss could be inferred. They threw out the question of presumable, probable or actual loss altogether, and the libellant was not required to prove actual loss, nor was the respondent allowed to prove it as against the sum named in the contract.

To the same effect says Sedgwick:

"Sec. 396. *General Observations.* * * *

Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points: First, the language employed; second, the subject matter of the contract; and third, the intention of the parties. These are indeed the great elements of interpretations of all contracts. But in the case we are now examining, the courts, especially in this country, have generally shown a marked desire to lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. *The language of the contract is not controlling.* And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex.* * * * But if, on the other hand, the contract is such that the strict construction of the phraseology would work

absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties (see Noyes *v.* Phillips, 60 N. Y., 408)."

Sedgwick on Damages (8th Ed.), Vol. 1, p. 558.

SEC. 407.—*The liquidation must be reasonable.* The parties, then, must not only intend that the sum named shall be paid over to the plaintiff upon the breach, the sum must also be reasonable in itself (People *v.* C. P. R. R. Co., 76 Cal., 29; Perzell *v.* Shook, 53 N. Y. Superior Court, 501; Sleeman *v.* Waterous, 23 Up. Can. C. P., 195). In other words, in every case where a fixed sum is stipulated as damages, the Court will look to see whether the stipulated compensation is a reasonable one; and if not, they will require damages to be assessed as if no stipulated sum were named in the contract. In the words of the Supreme Court of Michigan: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside" (Marston, *J.*, in Meyer *v.* Hart, 40 Mich., 517-523).

So firmly is this principle applied that the liquidation provided by a contract may, as the circumstances show to be equitable, in one case be upheld, and in another set aside. Thus in Hahn *v.* Horstman, 12 Bush, 249, a case of a common building contract, which stipulated damages at the rate of twenty dollars a day for delay in completing the contract, the defendant left the work unfinished; and the plaintiff more than a year after the time for completion, brought suit, claiming damages for the whole time at the stipulated rate. If the work had been finished, though a few days after the agreed time, it is well settled, as will be seen, that the stipulated sum could be recovered. In this case, however, to allow recovery at the stipulated rate would be grossly in excess of compensation; and the Court refused to allow damages at the stipulated rate (acc. Greer *v.* Tweed, 13 Abb.

N.S., 427; Colwell *v.* Foulks, 36 How. Pr., 306). Some courts say that the damages must not be "grossly excessive" (Parr *v.* Greenbush, 42 Hun, 232); Some, that they must not be "unjust and oppressive," (Scofield *v.* Tompkins, 95 Ill.; 190); Mueller *v.* Kline, 27 Ill., App., 473; Higginson *v.* Weld, 14 Gray, 165). "Unreasonable" (Hardee *v.* Howard, 33 Ga., 533; Sutton *v.* Howard, 33 Ga., 536; Maxwell *v.* Allen, 78 Me., 32; Daly *v.* Maitland, 88 Pa., 384; Williams *v.* Vance, 9 S. C., 344; Schrimpf *v.* Tenn. Manuf. Co., 86 Tenn., 219). "Extravagant" (Gammon *v.* Howe, 14 Me., 250), or "disproportionate" (Jaqua *v.* Heddington, 114 Ind., 309; Haymaker *v.* Schroers, 49 Mo., 406; Staples *v.* Parker, 41 Barb., 648). But all seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach (Tholen *v.* Duffy, 7 Kas., 405; Stearns *v.* Barrett, 1 Pick., 443; Gowen *v.* Saltwarsh, 11 Mo., 271; Dennis *v.* Cummins, 3 Johns. Cases, 297; Burrage *v.* Crump, 3 Jones L., 330; Pennypacker *v.* Jones, 106 Pa., 237; Jones *v.* Queen, 7 Can., 570). Thus where a contract of hiring provided that, on the servant leaving without notice, whatever was then due to him should be considered as liquidated damages for the breach of his contract, it was held that the forfeiture would not be enforced by the courts. Since the arrears of wages might be large or small, the principle of compensation was clearly departed from by the parties (Richardson *v.* Woehler, 26 Mich., 90; Schrimpf *v.* Tenn. Manuf. Co., 86 Tenn., 219; Jones *v.* Queen, 7 Can., 570). But the forfeiture of a fixed reasonable sum would be allowed (Richardson *v.* Woehler, 26 Mich., 90; Schrimpf *v.* Tenn. Mfg. Co., 86 Tenn., 219; acc. Jones *v.* Queen, 7 Can., 570).

Sedgwick on Damages, (8th ed.), Vol. 1, p. 583.

SEC. 408.—*Language not Conclusive; Rule in Case of Doubt.* It follows from what has been said that the language of the contract is not conclusive. The question whether a stipu-

lated sum is to be allowed as liquidated damages is a question of law, and no agreement of the parties to call it a penalty or liquidated damages can decide the question.

Jaquith v. *Hudson*, 5 *Mich*, 123–136.
Sedgwick on Damages (8th *ed.*), *Vol.* 1, *p.* 586.

SEC. 410.—*Penal Sum Collateral to Object of Contract.*

Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages. In a contract for the sale of land for $8,000, payable, $5,000 on the first of January following, and the rest in three annual instalments, a clause stating that "in further confirmation of the said agreement the parties bind themselves, each to the other, in the penal sum of $1,000," is not to be considered as liquidated damages for the breach of this agreement, but as a penalty superadded (Robinson *v.* Cathcart, 2 Cranch C. C., 590; acc. Richards *v.* Edick, 17 Barb., 260; Law *v.* House, 3 Hill (S. C.), 268).

The plaintiff drew up and delivered to the defendant a written lease of land of the plaintiff, and the defendant agreed to return the lease in ninety days or pay $3,000 on failure to do so. It was held that this sum was wholly collateral to the loan of the written instrument, and was not liquidated damages (Burrage *v.* Crump, 3 Jones L., 330).

The defendant agreed to allow the plaintiff to use a certain building while it stood, and gave him a note payable on breach of the agreement. This note was held not to be enforceable, since it was in the nature of a penalty (Merrill *v.* Merrill, 15 Mass., 488). A penal bond comes ordinarily under this rule. In some exceptional cases, the penalty in a bond, as will be seen, is regarded as liquidated damages; but in general it is regarded as a penalty. So of a bond to submit to arbitration (Henry *v.* Davis, 123 Mass., 345), or to convey land (Brown *v.* Bellows, 4 Pick., 179; Robeson *v.* White, 16 S. and R., 320; Burr *v.*

> Todd, 41 Pa., 206). The rule is the same if such an arrangement is in the form of an ordinary contract. If an agreement to submit to arbitration is secured by a promise to pay a collateral sum of money on breach of the agreement, that sum is held to be a penalty, and payment of it is not enforced by the Court (Spear *v.* Smith, 1 Den., 464; Henderson *v.* Cansler, 65 N. C., 542). And though the use of the words, "penalty," "forfeiture," "liquidated damages," is not conclusive, it will be considered by the Court as indicating the intention of the parties as to whether the sum named was or was not regarded by them as compensatory (Reilly *v.* Jones, 1 Bing., 302; Van Buren *v.* Digges, 11 How., 461; Bignall *v.* Gould, 119 U. S., 495; Dyer *v.* Dorsey, 1 G. and J., 440; Stearns *v.* Barrett, 1 Pick., 443; Salters *v.* Ralph, 15 Abb. Prac., 273; Colwell *v.* Foulks, 36 How. Pr., 306; Williams *v.* Vance, 9 S. C., 344; Smith *v.* Wainwright, 24 Vt., 97)."
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> *Sedgwick on Damages* (8 *ed.*), *Vol.* 1, *p.* 583.

The disproportionate or oppressive amount of the sum named as liquidated damages has always been taken into consideration by the Court. Says the Court of Appeals in *Colwell* v. *Lawrence*, 38 N. Y., 74:

> "It is scarcely to be supposed that the parties intended to fix an amount so extravagant, and which would be, if allowed as claimed, so grossly disproportionate to the actual damages, as liquidated damages for so trivial an omission or delay, and I cannot discover any sufficient and satisfactory reason for any such inference or conclusion."

In *Peekskill R. R. Co.* v. *Peekskill*, 21 App. Div., 94 (October Term, 1897), while the sum named as liquidated damages was held to be such by the Court, one ground of its decision was that "the sum does not seem to be unreasonable in amount or disproportionate to the actual damage which may have been

sustained." The Court further says, referring to the various stipulations for damages in breaches of contract:

> "In some of them although the stipulation in words provided that the sum specified should be regarded as liquidated damages, the Courts construed it as meaning a penalty. But this was done to prevent great injustice being worked, and relieve from hardship."

The principle is therefore one of active and constant application in the courts to-day.

It will be seen that the New York Court of Appeals, like the United States Circuit Court of Appeals, in the Fourth Circuit, disregards the fact that "a sum has been stipulated as a payment by the defaulting party." This fact is overridden not, in this opinion, "by fraud or mutual mistake," but by a totally different consideration, namely, that the amount is disproportionate to the presumable or probable damage.

So far is this carried that in the case of the *East Moline Co.* v. *Weir Plow Co.* (decided by the Circuit Court of Appeals for the Seventh Circuit June 6, 1899, 37 C. C. A., 62), not only did the agreement expressly state (p. 65): "That the measure of damages for the default of either party to carry out this agreement shall be fifty thousand dollars," but each party alleged default on the part of the other, and claimed the entire sum, namely, $50,000, as liquidated damages. Notwithstanding the express statement in the agreement where that phrase is used, notwithstanding the claim and admission made by both parties that such was the meaning of the contract, the Court, when it found for the defendant on its counterclaim, refused to consider the amount named as anything but a penalty.

The Circuit Court of Appeals further held, as a fact of which the Court could take judicial notice,

that the market value of a yacht—not only this yacht, but any yacht—was an "uncertain quantity" (*Opinion* C. C. A., p. 6), and that from this assumed "difficulty of estimating exact damages, the intention of the parties to consider it as liquidated damages may be inferred" (p. 7).

The rule by which a court may regard the sum mentioned in a contract as liquidated damages, rather than as a penalty, by reason of the impossibility of ascertaining actual damages, is a familiar one; but we doubt if it has ever been applied before, as the Circuit Court of Appeals applies it, to the question of determining the value of a specific vessel. The Court apparently holds that, as matter of law, the value of a steam vessel of this character is not ascertainable. No authority can be referred to which makes such an extension of the principle.

In the case of the *East Moline Plow Co.* v. *Weir Plow Co.* (Seventh Circuit, June 6, 1899), 37 C. C. A., 62, this question received considerable attention. As already stated, the provision of the agreement in that case was "that the measure of damages for the default of either party to carry out this agreement shall be $50,000." The decision turned specifically upon the application of this provision to a number of different acts of default of varying importance, but the Court held that such a provision as that stated in the contract could only be considered as liquidated damages (p. 68) "where it is evident that the damages for a breach would be uncertain in their nature and impossible of ascertainment by a jury"; or, again, "where the damages for such a breach being entirely uncertain and speculative in character"; or, again, "where the damages for a non-performance * * * are not measurable by any exact pecuniary standard." The last phrase occurs in the case of *Trower* v. *Elder*, 77 Ill., 452, cited with approval in the *East Moline* case.

In *Ward* v. *Hudson River Building Co.*, 125 N. Y., 230, the Court said:

> "We may at most say that where they have stipulated for a payment in liquidation of damages which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not on the face of the contract out of all proportion to the probable loss, it will be treated as liquidated damages."

An examination of the cases which hold that damages shall be considered as liquidated "where it is evident that they would be uncertain in their nature and impossible of ascertainment by a jury" or "speculative in character," or "not measurable by any exact pecuniary standard" shows that they apply to an entirely different state of facts from that presented here.

Thus in *Bagley* v. *Peddie*, 16 N. Y., 469: Here the bond was stated to be "in the sum of three thousand dollars, as liquidated damages and not by way of penalty or otherwise," for the performance of the covenants in a written agreement. One of the covenants was "not to reveal the secrets of a trade in which the principal obligor was to be employed," &c., and it was held "that a breach of this covenant involved damages so uncertain and difficult to be ascertained as that the sum named in the bond should be deemed not a penalty, but liquidated damages."

In *Dakin* v. *Williams*, 17 Wend., 447, the defendant, having sold out his business, agreed not to carry it on in the county, and fixed and liquidated $3,000 as the damage if he violated that provision. This was held to liquidate the damage, because the real damage was uncertain.

Among the other cases where damages were held to be uncertain, and, therefore, supported an agreement for liquidated damages, was one for damages for not assigning a lease (*Knapp* v. *Maltby*, 13

Wend., 587); an agreement not to carry on the business of perfumery in London (*Price* v. *Green*, 10 Mees. & Wells., 346); an agreement of one attorney with another not to carry on the business of attorney within fifty miles or interfere with or solicit the clients of the late copartnership (*Galsworthy v. Strutt*, 1 Wells., Hurl. & Gord. Exch. Reps., 659); the failure to complete four houses on the day specified (*Ward* v. *H. R. B. Co.*, 125 N. Y., 230).

On the other hand, a refusal to abide by an arbitrator's decision, when the decision made a money award, was held to be certain (*Spear* v. *Smith*, 1 Denio, 464). In *Kemble* v. *Farren*, 6 Bing., 141, a manager brought suit against an actor for a violation of an agreement to perform at Covent Garden for four years, the plaintiff had agreed to pay the defendant a fixed sum every night the theatre should be open. The agreement provided for a payment of "one thousand pounds liquidated damages, and not as a penalty or penal sum, or in the nature thereof," for a default by either of the parties in any provision of the agreement. The default was on the part of the actor, and the question arose as to whether the clause providing for liquidated damages was not supported by the uncertainty of the agreement; but the Court held that, as a certain sum was to be paid to the defendant, the agreed damages could not have been considered otherwise than as a penalty as to such fixed sum, and must be construed in the same way in respect to those covenants of which the breach would result in uncertain damages.

The above cases illustrate the nature of the distinction between certain or ascertainable and uncertain or speculative damages, in other words, damages for non-performance of a contract which are or are not "measurable by any exact pecuniary standard." The damage suffered by the practice of a rival in business, by the failure to assign a lease, by the revelation of trade secrets is clearly of such an uncertain character. That the value of a given vessel should be put in the same category, that it should be

decided, as matter of law, to be unascertainable, to be not measurable by any pecuniary standard is, we submit, an absolutely novel proposition. This is not a question of damages for loss of use. It is a question of damages for the loss of a ship. The fact that the ship is a yacht makes no difference. It is a specific article, the product of one of the ordinary forms of manufacture, and the cost of manufacture of this article is readily ascertainable; the value of the materials and labor which enter into its construction are determinable with the utmost facility. There are great numbers of persons who are entirely competent to give evidence as to the value of such a vessel. It is as readily ascertainable as the value of any other product of manufacture. It is not even an unusual or uncommon product of manufacture. The question of fluctuations in value does not here arise. The only question is: "What was the value of the yacht, assuming her continued existence, at the time she was required to be redelivered?" Her master said $30,000, and doubtless other estimates might have been made, as is frequently the case where questions of value arise in courts of law, but the question is nevertheless one which, in such a Court, would undoubtedly have been considered a proper question for the jury. Certainly a maximum value could have been ascertained, which this respondent has a right to contend should be a limit of liability. Nor would it occur to any one, in so submitting the question of value to a jury, that it was one which a jury could not determine by any exact pecuniary standard. In an age and country where juries in every great city are daily called upon to determine, and do determine, the damages for the loss of a leg, or an arm, or any other member, for the obscure consequences of disease or wounds, for a loss of human reputation or a loss of human life, it seems idle to say that, as matter of law, a jury could not determine the value of a yacht. In the case of *The Conqueror*, 166 U. S., 127, Mr. Justice

Brown said, referring to the value of the use of a yacht:

> "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, *as it is only in the larger ports that there can be said to be a market price for the use of vessels*, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.
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> * * * * * *
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> The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of Sturgis *v.* Clough passed, too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much greater certainty than it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market."
>
> *The Conqueror*, 166 U. S., pp. 127 and 134.

This Court, in passing upon the question, did not disturb the conclusions as to damages for the loss of use of the yacht reached by the Court below. It is quite evident, however, from the language of Mr. Justice Brown in the opinion, that, while there might be some difficulty in ascertaining the damage

consequent upon the loss of use for a period of time, although not an insuperable difficulty, there would be no difficulty at all in determining the value of the yacht itself, especially in the larger ports.

POINT II.

Assuming that the respondent was liable for the loss of the yacht, and that its liability was to be computed on the basis of the sum named in the alleged charter-party, the liability should still have been reduced by the sum already paid for the hire of the yacht, namely, $10,000.

Such was the opinion of Judge Brown in the trial Court, which was overruled by the Appellate Court.

The principle here involved is the simple and familiar one that where a surety has given a bond conditioned on the non-performance of certain agreements, and limiting his liability to a specific sum, any payment of the surety to the obligee on account of the provisions of the agreement discharges to that extent his liability on the bond, and recovery must be limited to the extreme amount named in the bond, less the amount which has been already paid on account of this liability. In regard to this question, three principles are to be noticed:

(1.) The last clause of the contract of suretyship limits the total liability of *The Sun* to the sum of $75,000. It reads:

> "That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars."

Reading the two instruments either together or separately, it is apparent that the meaning of this clause is that *The Sun*, in fulfilment of this alleged charter-party and agreement of suretyship should not be called upon to pay more than $75,000 as an outside limit.

(2.) There is nowhere to be found in either instrument any specific promise to pay the sum of $75,000 in case of the loss or non-return of the vessel. In order to assume any such promise or covenant, it must be read bodily into the contract.

(3.) The agreement of suretyship was to cover not only losses and damages which might occur to the boat or its belongings, but also the breach of any of the terms or conditions of the contract. The agreement of suretyship, therefore, secured not only numerous minor covenants of the charter-party, but also the covenant to pay the rental of the yacht, namely, $10,000.

It follows that the payment of the rental of $10,000 is one of the payments covered by and included in the aggregate maximum liability of the *The Sun;* that the covenant to pay the rental was executory, as the amount was paid after the signing of the agreements, and that, consequently, *The Sun* is entitled to have a deduction to that extent from its total liability. The reasoning of Judge Brown upon this question, which will be found in the *Transcript of Record*, pp. 355-7, seems to us to be unanswerable, and the question of law involved is of such importance that it should be passed on by the highest authority.

Says Judge Brown (fols. 1418-1420):

> " And the security required to be given by the terms of the charter and by the agreement of suretyship, which was in fact given and delivered at the same time the charter was signed, includes therefore the payment

of the charter hire as well as the performance of the many other obligations contained in the charter. The charter hire of $10,000, as the evidence shows, was paid by *The Sun's* check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16th. So much of its obligation of $17,000 has, therefore, been discharged by *The Sun;* and the express provision of the second instrument, called the agreement of suretyship, is that in no case shall the liability of *The Sun* exceed the sum of $75,000."

POINT III.

The respondent, not having authorized the execution of the alleged charter-party and agreement of suretyship, and not having ratified either of them except as to the user of the yacht, is not bound as to their special provisions beyond the ordinary liability of a bailee.

The alleged charter-party and agreement of suretyship were executed by Chester S. Lord, managing editor of one of the two newspapers published by the corporation, that is to say, the morning newspaper called *The Sun*. He was not an officer of the respondent, nor a director or trustee, nor even a stockholder. The alleged charter-party was in his name as the hirer, and the respondent is not referred to in any way therein except in the words, "For The Sun Printing and Publishing Association," following the signature. The so-called agreement of suretyship is signed in the same way, although it purports in the body of the document to be an agreement made by "The Sun Printing and Publishing Company." The evidence in the case

shows an entire absence of either a general or a special authority on the part of Mr. Lord to bind The Sun Association by either of these specific contracts (*Transcript of Record*, pp. 319-320, fols. 1274–1280; Testimony of President Dana), nor was there anything in his office which would lead to an inference that he was clothed with such authority. The evidence also shows that the Board of Trustees never took any action upon these agreements of Mr. Lord; and that, as individuals, they were not aware of their contents. There could of course be no ratification without knowledge.

Judge BROWN, in his opinion, in speaking of the charters, says:

> " Many circumstances, however, are brought out in the evidence in regard to the conduct of the parties during the charter period, as well as before, from which no doubt is left in my mind that these contracts must be deemed legally to be the contracts of The Sun, the defendant; that Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts; that he intended to bind the defendant and not himself, and that the trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht, and such perfect means of knowledge of all the particulars, had they desired to know them, as to make their acts in using the yacht under the charters, as they did, a ratification of Mr. Lord's action, and to bind them for the performance of his agreements made in their behalf."
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> *Transcript of Record*, pp. 352-353, fols. 1408-1409.

It will be seen that Judge Brown held that " Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts," but we submit that there is no evidence upon which such authority can be predicated.

The principles which are opposed to this decision are so familiar that it is hardly necessary to cite authorities from them. A few of them may, however, be referred to:

"Underlying the whole subject there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent."

Mechanics' Bank *v.* New York & New Haven R. R. Co., 13 N. Y., 632.

"As such agents neither appoint themselves nor prescribe the limits of their own authority, the fact that a person not being the officer or agent of a corporation claims to be such, or being such officer or agent claims to possess power which has not been conferred upon him, will not, subject to the exceptions elsewhere noted, bind the corporation."

4 Thompson on Corporations, Section 4880.

"But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts:

"1. That the act was done in the exercise; and.

"2. Within the limits of the powers delegated."

Mechanics' Bank of Alexandria *v.* The Bank of Columbia, 5 Wheaton, 337.

"One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority."

Alexander et al. v. *Cauldwell et al.*, 83 N. Y., 480.

"It would seem to be the general rule that no acts of an agent can be resorted to to establish a power not included within the terms of his commission, except those which are brought to the knowledge of his principals and are approved or acquiesced in by them."

Bickford *v.* Menier *et al.*, 107 N. Y., 493.

"While a principal is bound by his agent's acts when he justifies a party dealing with his

agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent.

That is, he is bound equally by the authority he actually gives, and by that which, by his acts, he appears to give.

For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. *The fundamental proposition is that one man can be bound only by the authorized acts of another.* He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

Edwards et al. v. *Dooley et al.* (*June*, 1890), 120 N. Y., p. 551.

The form of the instruments is enough to show to any one with the slightest experience in such matters that they were not done in pursuance of a formal exercise of a corporate authority. They were alone sufficient to put the other party upon notice.

"The principle under consideration does not extend so far as to allow the authority of an agent to do a particular act to be proved by proof of his having previously done *a few similar isolated acts*, the doing of which has been tolerated by the corporation; but there must have been such a uniform course of conduct, in the face of those entitled to oppose, as would justify a man of reasonable prudence in concluding that there had been an antecedent authorization."

4 Thompson on Corporations, Sec. 4886.

The above proposition disposes of the suggestion that because a vessel had been hired by Lord on one or two previous occasions his authority to execute these instruments could have been inferred.

The essential point here is that Lord was not an

officer of the corporation, and was not authorized in any way to bind it.

There can be no ratification of the acts of an agent without full knowledge on the part of a principal of all the facts, and there must always be, moreover, an intention on the part of the principal to ratify the unauthorized act of the agent. In this case, there was never any knowledge of the terms of the charter-party, or even of its existence, by the corporation or its officers, until after the loss of the yacht. There was no knowledge of the penalty fixed in the bond or of the valuation of the boat at $75,000, for, as to this matter, and all the other terms of the charter-party, the officers of the corporation were in absolute ignorance. There was, therefore, no intention on the part of the corporation, as principal, to ratify the terms of the charter-party. It was held by the N. Y. Court of Appeals in a recent case decided April, 1898, *Merritt* v. *Bissell*, 155 N. Y., 396, that —

> "A ratification of the unauthorized act of an agent or of a stranger who claims to act as such, if it exists, must be found in the *intention* of the principal, either express or implied. If that intention cannot be shown, no ratification can be held to have been established. While it is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge, or otherwise, in some cases, he makes the act his own, still, where one who has assumed to act as an agent for another has no authority to do so, but is a mere volunteer, a failure to disavow his acts will not amount to a ratification, unless under such circumstances as indicate an intention to do so" (pp. 400, 401).

This case in the Court of Appeals, *Merritt* v. *Bissell*, is important, for the Court of Appeals there decided unanimously that a payment of $500 by the defendant to the plaintiffs on a contract, did not constitute a ratification of the unauthorized contract, and the Court of Appeals reversed the unanimous

judgment of the Appellate Division of the Third Department (reported 84 Hun, 194), where the opinion had been rendered by Mayham, *P. J.*, and had been concurred in by Justices Putnam and Herrick. And this case would seem to be a sufficient answer to the theory of the libellant that the payment of $10,000 for the user of the yacht was a ratification of the terms of the charter-party.

It appears affimatively in the case that until the yacht was lost, the directors or trustees of the *Sun*, either as a board or as individuals, knew nothing about the papers in issue or the terms of the charter-party or agreement of suretyship, and where there is absolute ignorance, there can be neither ratification nor acquiescence.

Judge Thompson says in his Book on Corporations at Section 5298:

> "It is a well-settled principle in the law of *agency* that a principal may ratify the unauthorized acts of his agent by *acquiescence*, or even by *silence*, after being *fully informed* of the facts and circumstances attending the unauthorized act" (*Story on Agency*, Sec. 255; *Wharton on Agency*, Sec. 86; *Courcier* v. *Ritter*, 3 Wash. (U. S.), 549).

> "*Ratification presumes the existence of knowledge of all the facts, and the Court could well say, from all that appeared, that he was not informed of the whole transaction, and consequently was in no position to ratify the wife's act*" (Kelly *v.* Geer, 101 N. Y., 664).
>
> *Hommel* v. *Meserole*, Second Department, May Term, 1897, 18 Appellate Div., pp. 109, 110.

Even in the case of a contract made by a Vice-President and General Manager, the Court will not uphold it where there is an absence of authority and an absence of ratification. Such were the facts in the case of Camacho *v.* Hamilton Bank Note Co.,

decided by the Appellate Division of the First Department (New York). Judge Patterson says:

> "But it is claimed by the plaintiff that in making his arrangement with Gray, he was entitled to rely upon the apparent authority which he exercised as general manager, and upon the assumption that as general manager it was within his province to make this contract of employment. In the absence of proof of what exact authority belongs to a person descriptively styled a general manager, there is no rule by which a court can be guided in determining what the powers of such an official really are, except such as the evidence in a particular case may furnish of what the person has done in the general course of the business of the corporation. That the words "general manager" would import that the person bearing that title is a general executive officer for all the ordinary business of the corporation is all that may properly be inferred, and this would justify, in connection with proof of acts done, a conclusion that all ordinary contracts made by such an official are authorized by the corporation. But no presumption of law can be indulged in that, because a person acts as such a manager, he has the power to bind his principal *to contracts of an extraordinary nature* and of such a character as would involve the corporation *in enormous obligations and for long periods of time.* If a general manager, simply by virtue of his being charged with the ordinary conduct of the business, would have the right to bind his principal to a contract for service for three years, involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods and thus assume to himself a power which it cannot be supposed was ever intended to be lodged in him?
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> * * * * * *
>
> But here we find that the evidence completely fails to established the ratification. Certainly it is not to be deduced from any relation to the subject of Mr. Seebeck, who was president of the company at the time the let-

ters were written. The plaintiff testifies that Mr. Seebeck was in and out and saw him rendering services. *The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing.* Nor is it a ratification of *any terms or conditions* of any employment which might have been made without due authority (Harrington *v.* Bank, I. T. & C., 361).

* * * * *

We are of opinion that, upon the whole case, the court was right in rejecting the evidence of the two letters alleged to have constituted the contract, and upon these grounds:

FIRST.—That it is not to be inferred as matter of law that an agent who was a mere general manager of a business, by which term is meant one charged with the executive administration of the current business of the corporation, has the authority to bind his principal to any contract to run for a series of years, in the absence of proof of authority to make such a contract.

SECOND.—That, while such authority may be inferred from evidence of acts of the general manager, known to and acquiesced in by the officers of the corporation, yet the proof in this case is wanting in that element, and there is no proof of such acts as would have justified the plaintiff in relying upon an apparent authority to make the contract on which this action is brought.

THIRD.—*That there is no proof of ratification with knowledge of the contract.*

The plaintiff having sued on the contract, and not upon a *quantum meruit*, and the effect of a judgment in his favor being to make a binding adjudication entitling him to recover for subsequent breaches, the judgment must be affirmed, with costs."

VAN BRUNT, *P. J.*, WILLIAMS, O'BRIEN and INGRAHAM, *JJ.*, concurred.

Camacho v. *Hamilton Bank Note and Eng. Co.*, 2 Appellate Division Rep., pp. 371-374.

The fact that the corporation had the use of the yacht and paid for such use the sum of $10,000, and that its officers did one or two minor acts in reference to the vessel, indicates a ratification only so far as it regards the mere hiring at a specific rate. The absence of all knowledge or ratification of the particular terms and conditions of these extraordinary agreements absolved the corporation from liability under them. Its liability then becomes that of an ordinary case of bailment, where the bailee, having hired the article in question, is under a liability established by the law to redeliver the article, assuming that the article is still in existence; or, at most, if the article has been lost or destroyed through the negligence of the bailee, to answer in damages for the value of the article destroyed. It is not necessary that such a contract of hiring should be written, and the rights and duties that flow from it are matters of easy determination in law.

This ordinary contract, express or implied, for the user of the yacht may be said to have been ratified by the action of the association in keeping the vessel in service, paying her hire, &c. To suppose, however, that this includes such extraordinary provisions as are to be found specifically in the present alleged contract, as, for instance, that which affixes a value to the vessel at more than double her actual value; that which furnishes a guarantee or security of $75,000 to secure any and all losses and damages sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms and conditions of the contract; that which prescribes a demurrage of $500 a day for each and every day's detention after the alleged charter-party had expired—all these are stipulations quite outside the provisions of the ordinary contract of bailment, and the surety cannot be held responsible therefor in the absence of its knowledge, of any authority on the part of the agent, or of any knowledge or

ratification on the part of the trustees. The existence of such unauthorized and unratified covenants vitiates the whole contract, and sets the parties back to the remedy of a *quantum valebat* under an ordinary implied contract of bailment, by which the stipulated rent would require to be paid and the property be redelivered at the expiration of the term.

Assuming that this is a case of such an implied contract, nothing could be predicated on the use of the yacht or payment of the charter money in respect of ratification except that the general terms of the implied contract of bailment were ratified; and, as Judge Patterson says, in the case last cited:

> "The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing. Nor is it a ratification of any terms or conditions of any employment which might have been made without due authority."

POINT IV.

The breach of the contract, alleged as the ground of recovery, being the failure to redeliver the vessel, the case falls within the principle that where a contract has been made to deliver a specific thing, and the thing has in the meantime been destroyed, no obligation rests upon the contracting party to deliver it or answer in damages unless the destruction was due to his negligence.

Upon this question the leading case is that of Young *v.* Leary (decided in the New York Court of Appeals), 135 N. Y., 569. This was an action brought

against Leary, the surety on a charter-party of one McKay. The provisions of the charter-party were in some respects similar to those in the case at bar. There was a contract on the part of the charterer to insure the vessel for the benefit of the owner during the term of the charter-party, which expired in the month of October. This covenant in the contract was duly performed. It was also provided that all other losses not covered by the policy described during the term of the charter-party should be paid by the charterer. The charter-party terminated in October, at which time the parties were negotiating for a purchase and sale of the vessel. The negotiations fell through, and the vessel remained in the possession of the charterer and was so situated when she was destroyed in the following January. There was the usual stipulation for the redelivery of the vessel, which obligation, however, was one that would have devolved upon the charterer without any written contract. It was held that the stipulation in reference to insurance did not impose any liability for the loss upon the charterer, in the circumstance, because the term of the charter-party had expired, and the owner, by permitting her retention subsequent to the expiration of the charter-party, had waived the default in the covenant to redeliver on the date named, but only as to the specific date. The question then was, could the plaintiff recover for the failure to redeliver subsequently, after the vessel had been lost? Said Mr. Justice Peckham, in delivering the opinion of the Court:

> "The questions in this case arise out of a charter-party executed on the 17th of October, 1884, by the Washburn Steamboat Co., and one McKay, for whom the defendant became surety. The company on the day mentioned let and McKay hired the steam propeller called the *Alicia A. Washburn*, of which the company was the owner, for the term of twelve months, from October 17, 1884, to be employed in lawful trade be-

tween Key West and other points on the West Florida coast on the terms and conditions mentioned in the charter-party. Among other provisions thereof was one by which McKay agreed to procure a fire and marine insurance policy for $27,000 for one year on such boat, in the name of the company, and to pay the premium thereon as an additional consideration of the charter. McKay also agreed to pay a certain rent per month for the use of the boat, commencing on the 17th of October, 1884, and also agreed that on the termination of the charter he would '*deliver the said steam propeller to the Washburn Steamboat Company, or their legal representatives, in New York harbor, in the same good condition as she is now in, ordinary wear and tear excepted.*' Another provision in the charter-party was as follows: 'That said McKay hereby assumes all fire, marine and other risks of damage that may happen to said vessel and also assumes all liability of every kind and nature, for which said propeller or its owners may be responsible during the term of this charter, which is not covered by fire and marine insurance hereinbefore mentioned.'

McKay procured in the name of the company a fire and marine policy of insurance upon the vessel for $27,000, for one year from October 17, 1884, and paid the premium thereon as he had agreed to do in the charter-party.

The vessel was burned at sea in January, 1886."

Idem, pp. 572, 573.

The Court further said:

"The remaining obligation of McKay under this charter-party is contained in that provision by which he agreed in the language already quoted, to deliver the vessel to the company in New York harbor.

It has been claimed on the part of the plaintiff in the courts below, and it is now urged here that this promise to deliver was on its face an absolute and uncondi-

tional one and a failure to fulfill it would not be excused by the entire destruction of the vessel before breach and without fault on the part of the charterer. It is true that the vessel was not destroyed at the time when by the terms of the original promise McKay had bound himself to deliver it in New York harbor. The question is whether the contract to deliver was absolute and only to be complied with by an actual delivery within the time agreed upon, or whether a destruction of the thing hired before breach and without the fault of him who hired it would not absolve the latter from his contract. If it would, there is the further question whether the facts herein do not show a waiver of the contract to deliver at the specified date and an implied extension of the time for such delivery and the destruction of the vessel within the time thus extended without the fault of the hirer. Or at least whether the facts proved were not enough to permit a finding of the fact of such waiver and extension.

* * * * *

We do not think that the law applicable to the class of cases of which that of *Harmony* v. *Bingham* (*supra*) is a conspicuous example applies here.

The contract in this case comes, as it seems to us, under another class which relates to the hiring for use of the thing hired and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. *Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused.* If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand and without fault on the part of the bailee, he is excused. (Williams *v.* Lloyd, W. Jones, 179; Sparrow *v.* Sowgate, *Id.*, 29.) Mr. S. Martin Leake, in his Digest of the Law of Contracts, at page 706, says: 'The authorities establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning,

have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the default of the contractor' (pp. 576-577).

* * * * * *

When language like that found in this agreement is used, the condition of continued existence is implied, and as thus interpreted it creates nothing more of an obligation than that which the law raises without any such promise. When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it. So it was held in the case of *Ames* v. *Belden* (17 Barb., 513), where the defendant was sued for its value for not returning a steamboat according to the condition of the charter-party, by which defendant agreed to return the same at the expiration of the term in as good condition as it then was, excepting ordinary use and wear. The Court said the language must be held to have reference to the ordinary obligation of such a bailee to return the article hired, and defendant was exempt if before the time arrived. the article had been destroyed without his fault. This is only another way of saying that *an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and if in the meantime it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed.* The case is thus entirely sup-

ported by the cases above cited" (pp. 577–578).

It seems to me as if authorities are not required upon the proposition that in a contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made, for, to again quote the language used by Mr. Justice BLACKBURN in *Taylor* v. *Caldwell* (*supra*): 'In the course of affairs men in making such contracts in general would, if it were brought to their minds, say that such should be the condition.' There is nothing in the other portions of the charter-party which affects in any way to the detriment of the defendant this particular question. If there had been no provision for insurance, and the vessel had been destroyed by fire before the 17th of October, 1885, and without the fault of McKay, it seems to me plain that neither he nor his surety, the defendant here, would be liable on the promise to deliver the vessel in the harbor of New York. The provision for insurance was complied with by McKay, and hence no liablility attaches by reason of it" (pp. 578, 579).

In that case it appeared that Leary, the surety of McKay, had insured the vessel against loss by fire in the sum of $17,000, and had collected the insurance and had retained it for his own use and benefit, and the Court said that it might be that the plaintiff would have an action to recover from the defendant the amount of the insurance as for money had and received by the defendant to his use.

In the opinion delivered by Judge Wallace for the Circuit Court of Appeals the principle is stated thus (p. 4):

"A contract of hiring presupposes the continued existence of the thing hired during the term of hiring, and because the parties must have known that otherwise it could not be fulfilled, and the whole contract is founded upon that understanding; the courts have construed express promises for the redelivery of the thing in as good condition as

> when received as intended merely to stand for the implied condition, and not as intended to impose a more stringent liability upon the hirer. Such a case was *Young* v. *Leary* (135 N. Y., 569). That was an action to recover of a charterer the value of a vessel which was destroyed during the charter term by fire, and was brought for the breach of a condition in the charter to deliver the vessel to the owner at its termination 'in the same good condition as she is now, ordinary wear and tear excepted.' The Court read the condition as intended to create no other obligation than would have been raised by implication without it, and said: 'When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.' Decisions to the same effect are *Ames* v. *Belden* (17 Barb., 513), and *Hyland* v. *Paul* (33 Barb., 241)."

In other words, the liability under the contract was the ordinary liability of a bailee.

But the Court, having thus stated the law as enunciated in Young *v.* Leary, goes on to say:

> "On the other hand, the Supreme Court of Massachusetts decided in an action brought to recover damages to the article hired caused by accidental injuries, where the contract contained a condition to return it 'in as good order as when received, customary wear and tear excepted,' that the bailee was not excused from performance. Harvey *v.* Murray (136 Mass., 377)."

Judge Wallace then goes on to adopt the supposed doctrine of these Massachusetts cases, thereby distinctly overruling Young *v.* Leary, which has always been regarded since it was decided as being the settled law, and which was generally held to have overruled the earlier cases.

The case of Harvey *v.* Murray, 136 Mass., 377 (decided in 1884), has no application here. It was a

case of hiring, where the defendant hired the plaintiff's piano, with an agreement "to return it in as good order as when received, customary wear and tear excepted." The piano was injured in a storm, and the Court rightly held that the defendant was required to make good the injury. Obviously this has nothing to do with the question of the impossibility of performance by the destruction of the *res*.

Drake *v.* White, 117 Mass., 10, a still earlier case, cited by Judge Wallace, is a case where a safe was held by the defendant as collateral security for debt and an express promise in writing was made by the defendant upon payment of the note to redeliver the safe "or its equivalent in money." The safe was destroyed by fire, and the Court held that the impossibility of performing one part of the alternative promise did not relieve the defendant from the obligation to perform the other.

Neither of these cases affects the question in the case at bar.

The cases of Warth's Executrix *v.* Mack, 51 U. S. App., 133, and Burrill *v.* Crossman, 35 U. S. App., 608, have no application to the present case. The first was a case where the parties contemplated the event of the destruction of the thing in question and made an agreement providing for that event. The Court decided that they must be held to that agreement. The second was an action for demurrage in the unloading of a cargo at Rio at the time of the revolution. There the acts of the revolutionists were one of the reasons alleged to justify the inability of the parties to unload. The Court held that the obligation of the charterer to have his work completed within that period, whatever circumstances occurred, was one that could not be met by the suggestion that the revolution caused delay.

Of course, in the present case, if the destruction occurred through the negligence of the bailee, the latter would be liable for the actual loss. The decision of the Court, however, did not turn upon this

question, but solely upon the fact of failure to redeliver the vessel.

The matters of law upon which it is contended by the petitioner that the Court erred, by reason of which the writ of *certiorari* should issue, are as follows:

1. Where a sum is named in a contract of suretyship as liquidated damages, even though expressly so named, the Court will not regard it as anything more than a penalty, when the amount specified is disproportionate to the presumable or probable loss.

This principle, asserted with great clearness and emphasis by the Circuit Court of Appeals in the Fourth Circuit and affirmed on an argument for a rehearing, with the concurrence altogether of five Judges, including the Chief Justice, asserted likewise repeatedly by the Court of Appeals of the State of New York, is absolutely rejected and reversed by the decision in the case at bar, which not only disregarded the general principle, but, by affirming the judgment of the trial Court, rejected from consideration all evidence as to probable, presumable or actual loss.

2. The virtual adoption of the doctrine that, as matter of law, the value of a specific yacht was of so uncertain and speculative a character as to be incapable of measurement by pecuniary standards and to be impossible of ascertainment by a jury.

3. The proposition that, assuming that $75,000 was to be taken as the value of the yacht, the payment made by the respondent association of $10,000 should not be applied, as directed by the trial Court, as a payment *pro tanto* of its maximum liability of $75,000, and the decision that the sum of $75,000 must be paid in addition to the $10,000 called for by the covenants in the contract, making a total payment on account of this yacht of the sum of $85,000, with costs.

4. The setting up of the principle that, where a contract in writing has been made by an unauthorized agent, without knowledge of his principals in respect to its details, and without ratification, the contracting party is as much bound by all the onerous provisions of such a contract as if he had entered into it with full knowledge or had expressly ratified it; when, in point of law, it is clear that the only ratification which the corporation had made was a ratification of the general contract of hiring, or the contract for the user of the yacht. In fact, the only thing which could be presumed to have been ratified by the respondent corporation was the implied contract of bailment.

5. The attempt to reverse Young *v.* Leary and other high authorities by holding that the destruction of the thing to be redelivered did not absolve the bailee, unless the destruction was in consequence of its own negligence.

All these points are fully covered by the assignment of errors.

A very full assignment of errors was filed by counsel for the respondent, setting forth, among other things, various errors in the admission of incompetent and irrelevant evidence.

Transcript of Record, pp. 361–372, fols. 1441–1488.

FIRST.—As to the lack of original authority in the making of the contracts.

> "EIGHTEENTH.—It appears by the record that the Court erred in holding that the alleged contracts, the charter-parties or charters executed by Chester S. Lord, the Managing Editor of *The Sun*, were legally the contracts of *The Sun*, the defendant."
>
> Assignment of Errors, *Transcript of Record*, p. 370, fol. 1478; Opinion, *Transcript of Record*, p. 352, fol. 1408.

"NINETEENTH.—It appears by the record that the Court erred in holding that Chester S. Lord had such general authority as was sufficient to enable him to enter into these contracts or charters."

Assignment of Errors, *Transcript of Record*, p. 370, fol. 1479; Opinion, *Transcript of Record*, p. 352, fol. 1408.

SECOND.—As to ratification.

"TWENTIETH.—It appears by the record that the Court erred in holding that the Trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht and such perfect means of knowledge of all the particulars had they desired to know them, as to make their acts in using the yacht under the charters as they did, a ratification of Mr. Lord's actions, and to bind them for the performance of his agreements made in their behalf."

Assignment of Errors, *Transcript of Record*, p. 370, fols. 1479, 1480; Opinion, *Transcript of Record*, pp. 352-353, fols. 1408, 1409.

THIRD.—As to liability.

"TWENTY-FIRST.—It appears by the record that the Court erred in holding that the yacht having been a total loss, the defendant under the agreement in the charter 'to be liable and responsible for any and all loss and damage "as well as by the agreement to surrender the yacht" in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted' as well as under the agreement of suretyship so called engaging that the hirer should 'well and faithfully perform and fulfill everything in and by said agreement on his part to be kept and performed' became liable to the libellant for his loss and damage through its failure to

return the yacht on the first of October when the charter expired."

Assignment of Errors, *Transcript of Record*, pp. 370, 371, fols. 1480, 1481. Opinion, *Transcript of Record*, p. 354, fols. 1415, 1416.

"TWENTY-NINTH.—It appears by the record that the Court erred in granting a decree to the libellant for $65,000, with interest and costs."

Assignment of Errors, *Transcript of Record*, p. 372, fol. 1486; Opinion, *Transcript of Record*, p. 358, fol. 1429.

FOURTH.—As to the sum of $75,000 being liquidated damages, and not a penalty.

"TWENTY-THIRD.—It appears by the record that the Court erred in holding that some effect must be given to the clause declaring that $75,000 shall be considered and taken as the value of the yacht because the sum of $75,000 was not inserted in the agreement of suretyship as liquidated damages but was inserted as a penalty."

Assignment of Errors, *Transcript of Record*, p. 371, fol. 1482; Opinion, *Transcript of Record*, p. 356, fol. 4121.

"TWENTY-FOURTH.—It appears by the record that the Court erred in holding that the value fixed, namely, $75,000, should be taken as the agreed value of the yacht at the beginning of the charter."

Assignment of Errors, *Transcript of Record*, p. 371, fol. 1483; Opinion, *Transcript of Record*, p. 356, fol. 1423.

FIFTH.—In not limiting the liability of the respondent to the market value of the yacht.

"TWENTY-SEVENTH.—It appears by the record that the Court erred in not granting to the defendant before final judgment an

opportunity to show that the fair market value of the yacht *Kanapaha* was far less than $65,000 or $75,000."

Assignment of Errors, *Transcript of Record*, pp. 371, 372, fols. 1484, 1485.

"FIFTEENTH.—It appears by the record that the Court, in view of its express declaration that all evidence of value was reserved for a future hearing, erred in giving the respondent no opportunity to prove the value of the yacht *Kanapaha* or to prove that it had been grossly over-valued in the alleged charter-party. This is shown by the following portions of the record:

When Mr. Bartlett objected to a question propounded to Mr. Frank B. Jones offered as an expert on the value of yachts, the question being: 'Will you state whether there is any market value for steam yachts?' The Court said: 'I sustain the objection, but all questions on damages are reserved; without prejudice to either party, the evidence is for the present excluded.'"

On page 241 of the Transcript of Record Mr. Hughes said:

"MR. HUGHES: We ask for the purpose of this record that the testimony of Capt. Atkinson as to the valuation of the yacht *Kanapaha*, and as to the value of other yachts, between pages 70 and 80 of his deposition be stricken out; save only the statement of Capt. Atkinson that a yacht has no market value.

THE COURT: I shall strike out nothing from the deposition. I will note that on this hearing, no evidence as to damages will be considered; that all such evidence is to be reserved for hereafter.

MR. HUGHES: We do not ask that it be stricken out of the deposition but that it be stricken out from this record, the deposition being in one aspect of the case entirely before your Honor.

THE COURT: I rule that all the evidence in Capt. Atkinson's deposition relating to dam-

ages is not considered as received upon this present hearing, but that that evidence and all other evidence on damage is reserved for future consideration in case any decree should be found for the libellant.

MR. BARTLETT: Evidence as to the condition of the yacht; all that stands, of course?

THE COURT: Do you mean her seaworthy condition?

MR. BARTLETT: Her general condition, yes.

THE COURT: No evidence on the question of damages is considered at this time.

MR. HUGHES: We understand that that includes the evidence as to the value of the yacht?

THE COURT: Of course."

Assignment of Errors. *Transcript of Record*, p. 367, fols. 1471, 1472. See *testimony of Frank Bowne Jones*, *Transcript of Record*, p. 243, fol. 969; p. 245, fol. 978. See also *Transcript of Record*, pp. 281, 282; fols. 1122–1125.

"SIXTEENTH.—It appears by the record that the Court erred in not considering and in not giving any force and effect to the evidence of Captain Stephen B. Atkinson that the yacht *Kanapaha* would not have sold in September, 1898, or any time in the summer of 1898, prior to the accident, for $30,009."

Assignment of Errors. *Transcript of Record*, p. 369, fols. 1475–1476. See *Deposition of Stephen B. Atkinson*, *Transcript of Record*, p. 147, fol. 586.

"SEVENTEENTH.—It appears by the record that the Court erred in not considering and in not giving any force and effect to the statement of Captain Stephen B. Atkinson that the yacht *Kanapaha* in 1898 was a boat eighteen years of age, and that the said yacht had no new engines, no new saloons, and no new tubes, and had nothing new about her excepting the boilers.

And that the said yacht had a low rate of speed, about eleven or twelve knots, and a large consumption of coal, and that she had no electric light plant, and no ice plant, such as modern steam yachts always have."

Assignment of Errors, *Transcript of Record*, pp. 369-370, fols. 1476-1478.
Deposition of Captain Atkinson, *Transcript of Record*, p. 144, fols. 574; p. 143, fol. 571; p. 142, fol. 567.

SIXTH.—As to the extent of the alleged ratification.

"TWENTY-EIGHTH.—It appears by the record that the Court erred in not holding that even if there was a ratification by the defendant's trustees of the hiring of the yacht, there was no ratification by said trustees of the alleged valuation of the yacht at the sum of $75,000."

Assignment of Errors, *Transcript of Record*, p. 372, fol. 1485.

SEVENTH.—In not rendering judgment for the respondent.

"THIRTIETH.—It appears by the record that the Court erred in not rendering judgment for the defendant, dismissing the libel with costs."

Assignment of Errors, *Transcript of Record*, p. 372, fol. 1486.

Upon the grounds above stated, it is asked that the writ of *certiorari* may issue.

All of which is respectfully submitted.

JAMES RUSSELL SOLEY,
FRANKLIN BARTLETT,
Of Counsel for Petitioner.

No. 49.

Brf. of Soley & Bartlett for Pet'r

Office Supreme Court U.S.
FILED
OCT 16 1901
James H. McKenney,
Clerk.

Filed Oct. 16, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 49.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Petitioner,

against

WILLIAM L. MOORE.

BRIEF FOR THE SUN PRINTING AND PUBLISHING ASSOCIATION, PETITIONER.

JAMES RUSSELL SOLEY,
FRANKLIN BARTLETT,
Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 49.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Petitioner,

vs.

WILLIAM L. MOORE.

BRIEF FOR THE SUN PRINTING AND PUBLISHING ASSOCIATION.

Statement of Facts.

(References to the Transcript of Record are to the original or side pagings.)

This case comes before this Court on a writ of *certiorari*, granted upon the petition of the Sun Printing and Publishing Association, filed April 30, 1900, requiring the United States Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination, the case of William L. Moore, Libellant-Appellant, vs. The Sun Printing and Publishing Association, Respondent-Appellant.

The case is a libel *in personam* in Admiralty, filed in the District Court of the United States for the South-

ern District of New York by William L. Moore, as owner of the steam yacht "Kanapaha," to recover the sum of $75,000, with interest from October 1, 1898, from The Sun Printing and Publishing Association, the petitioner herein. The libel alleges, in substance, that the said yacht was chartered by the petitioner from the libellant under a certain written agreement designated a "charter party," and that the respondent or petitioner "has failed and neglected to surrender and deliver said yacht to this libellant or his agent, as provided in said charter party, and in that said yacht, while in the charge and control of said respondent, its agents or servants, as aforesaid, was wrecked and is a total loss" (Libel, Par. 12th, Trans. of Rec., p. 7).

The cause was tried in the United States District Court for the Southern District of New York before Judge ADDISON BROWN on April 14, 1898. The final decree gave the libellant judgment in the sum of $65,000, with interest thereon from October 1, 1898.

From this final decree and judgment the respondent appealed to the United States Circuit Court of Appeals for the Second Circuit. The libellant also appealed from the decree on the ground that the damages awarded were insufficient.

The Circuit Court of Appeals, April 17, 1900, modified the decree, by adding $10,000 to the sum already found against the respondent, and remanded the cause to the District Court to enter a decree for the libellant accordingly.

Thereafter, on the petition of the respondent-appellant, a writ of *certiorari* of this Court was issued, dated May 15, 1900, directing that the cause and the record and proceedings therein be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, and in compliance therewith the cause is now before this Court.

The "Kanapaha" was an old steam yacht. She was built in 1880, 18 years before she was lost. During this period of 18 years no substantial repairs appear to have been made to the vessel, with the exception of renewing her boilers. She was therefore an antiquated vessel, built before the modern improvements in yacht building, and she was destitute of such improvements. She had no electric-lighting plant, no ice plant or refrigerating plant, both of which are essential features of modern yachts of her size. She had no new fittings of any kind. Everything about her, except her boilers, was old. Her speed was low, about 11 or 12 knots an hour, while her consumption of coal was large, as might be expected from the date at which her engines were built. In short, she was an old boat, and that of an old-fashioned type. She was a small vessel of her type, her tonnage being only 125 tons net. It can be shown that her original cost at Cramps' was $59,000, and that she was sold four years later for $50,000. But these facts as to original cost are unnecessary, because it was proved by uncontradicted evidence that her value in the summer of 1898 was not more than $30,000. Further evidence as to value might have been introduced, but the Court refused to consider it.

Testimony of Stephen B. Atkinson, Master, Transcript, pp. 142–147; Ruling of Court, p. 281.

In March, 1898, an agreement, or so-called charter party, was made between Chester S. Lord, the managing editor of the "Sun," one of the newspapers published by the defendant corporation, and Thomas Manning, the agent for William L. Moore, the owner of the yacht "Kanapaha," and the libellant in this action, by which it was agreed, in substance, that Mr. Lord should hire the yacht for two months from April 1, for the sum of $5,000. The stipulated price was duly paid, and the yacht was turned over to Mr. Lord. Before the expiration of the term for which the yacht was hired, a new agreement was entered into by the

same parties, on the 14th day of May, 1898, for a further letting of the yacht for the term of four months from June 1 to October 1, 1898, for the sum of $10,000. The terms of this agreement, except as to the period of hiring and as to compensation, were identical with the first.

In connection with the second agreement, an instrument in the nature of an agreement of suretyship was executed by the said Chester S. Lord, and it is upon these two agreements that the present action was brought. The second alleged charter-party is printed in the transcript as Libellant's Exhibit 4, page 334, and is as follows :

> " MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore, of the City of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord, of the City of New York, party of the second part, hereinafter called the hirer, witnesseth :
>
> " That the said William L. Moore, being the owner of the steam yacht 'Kanapaha,' enrolled in the Atlantic Yacht Club, agrees to let and does hereby let, and the hirer agrees to hire and does hereby hire, the said yacht as she is now for the term of four months, from the first day of June, expiring on the first day of October now next ensuing, for the sum of ten thousand dollars ($10,000), payable on the signing of this agreement.
>
> " That the hirer will carry out the provisions of the charter-party made on the first day of April last, and, will, until the expiration of this contract, keep said yacht in repair and will pay all its running expenses, including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and

tackle at the expiration of this contract, to the owner or his agent, at Manning's basin, foot Twenty-sixth street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

"That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

"That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000) and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

"That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500) per day for each and every day's detention.

"The hirer shall be liable and resposible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

"That the hirer during the continuance of this agreement shall at all times, and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"THOMAS MANNING.
Agent for William L. Moore.
"CHESTER S. LORD,
"For the Sun Printing and
Publishing Association."

The accompanying agreement of suretyship (Libellant's Exhibit 5, Transcript, p. 335) reads:

"WHEREAS, by agreement or charter-party dated May 14th, 1898, William L. Moore, of the City of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the City of New York, hereinafter called the hirer, the steam yacht 'Kanapaha,' enrolled in the Atlantic Yacht Club, as will more fully and at large appear by a copy of said agreement or charter party hereunto annexed and hereby made part hereof:

"Now, at the request of the said hirer, and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged,

"We, the Sun Printing and Publishing Company, of the City of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

"FIRST. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

"SECOND. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer, and expressly waive any

and all notice of non-performance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

"In witness whereof, we have hereunto set our our hands this 14th day of May, 1898.

"THIRD. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000).

"CHESTER S. LORD,
"For Sun Printing and Publishing
"Association.

"STATE OF NEW YORK, }
"County of New York, } ss.:

"On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known, and known to me to be the Managing Editor of The Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed.

"A. H. BRADLEY,
[SEAL.] "Notary Public,
"New York."

It will be noticed that the above instruments are inartificially drawn, and are, in some respects, contradictory.

Subsequent to the execution of the two instruments, and on May 16, 1898, the sum stipulated to be paid for the hire of the yacht—to wit, $10,000—was paid.

"The charter hire of $10,000, as the evidence shows, was paid by *The Sun's* check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16."
Opinion of Judge Brown, Transcript p. 355.

The respondent-appellant, The Sun Printing and Publishing Association, is a corporation engaged in the business of publishing two newspapers. Its governing body at this time was a Board of Trustees composed of four persons—Paul Dana, the president; Thomas Hitchcock, the secretary; William M. Laffan, the general manager, and Franklin Bartlett. Neither as a board nor individually did any of these persons take any part in the making or execution of these agreements. The record fails to show any knowledge on their part of the execution of such agreements. It fails to show any authority in the managing editor of the newspaper to make such agreements. It fails to show any act of ratification, formal or informal, on the part of such Board of Trustees of the particular terms of the agreements. It shows that the stipulated sum of money for the hire of the boat was paid out of the funds of the corporation; that the employees of the corporation had the use of the boat, and that the corporation paid its running expenses as well as some insurance premiums. Beyond this the record shows nothing. The numerous and onerous stipulations contained in the instrument signed by Mr. Lord, the managing editor, were absolutely unknown to the corporation, and, of course, were not acted upon.

The yacht went ashore on the night of September 5, 1898, near the coast of Cuba, on a reef not shown on the latest United States charts issued prior to her sailing, with which the vessel had been furnished. She became a total loss, and the covenant in said charter party for her redelivery at the expiration of the term thereby became impossible of fulfillment. The term for which she was hired expired October 1, 1898. There was, at the time of her loss, no insurance upon the vessel.

The immediate cause of the stranding of the vessel was the extinguishing by the Spanish authorities of two conspicuous and important lights at the entrance of the harbor of Nuevitas, which formed the ordinary

and indispensable guide to navigation at night in these waters. These lighthouses are thus described in the official publication of the Hydrographic Office:

"The lighthouse on Maternillos point is 170 feet high, white, with the word 'Colon' painted on it, and exhibits 174 feet above the sea a fixed and flashing white light every 48 seconds; duration of flash 5 seconds; light should be visible 17 miles."

The other extinguished light, called the Eastern Point Light, situated on Barlovento or Pilot Point, is thus described:

> "On Barlovento or Pilot Point, the East side of the entrance, is a quadrangular building painted yellow, and a white mast stands in the middle of it, from which is exhibited, 48 feet above the sea, a white light, visible nine miles."

The said official publications also contain the following statement:

> "The entrance of the harbor may be recognized by the Maternillos lighthouse, by three small hills on the south side of the harbor and by three islets in the harbor, called Los Ballenatos, a little higher than the surrounding land. Also, on the east side of the entrance is a quadrangular building, painted yellow, surmounted by a white mast, from which is shown a light."
>
> Libellant's Exhibit 21, p. 345.

The master testified (p. 134):

> "I had been informed that the lights on the North side of Cuba had been relit, and were burning," and that "the stranding would have been avoided if the light had been burning."
>
> Transcript, pp. 133–6.

The above evidence, showing that the loss of the yacht was caused by no want of skill in

navigation, and by no fault on the part of the vessel, was evidently not considered by the trial Court in making its decision, the defendant being held liable regardless of any question of care used in the navigation of the vessel.

Upon the trial the Court expressly refused to consider any and all evidence as to the value of the yacht, and as to the amount of the loss and damage which the libellant had sustained by reason of her destruction. The Court said in reference to a motion to strike out evidence from the deposition of Capt. Atkinson upon the subject of the value of the vessel:

> "I shall strike out nothing from the deposition; I will note that on this hearing no evidence as to damages will be considered, and that all such evidence is to be reserved for hereafter.
>
> * * * * *
>
> "I rule that all the evidence in Capt. Atkinson's deposition relating to damages *is not considered as received upon this present hearing*, but that evidence and all other evidence of damage is reserved for future consideration, in case any decree should be found for the libellant."
>
> Transcript, p. 281.

And again the Court said (Transcript, p. 282):

> "No evidence on the question of damages is considered at this time."
>
> "MR. HUGHES: We understand that that includes the evidence as to the value of the yacht.
>
> "THE COURT: Of course."

No further opportunity was given to introduce evidence on the subject of value, and it is evident from the opinion of the trial Court (Transcript, p. 349) that such evidence was not considered.

It appears from the opinion (Transcript, pp. 354–357) that the amount of damage was arrived at by taking the figure $75,000, named in the charter party, and deducting therefrom the sum of $10,000, which was the amount of the charter hire. The Court expressly states in reference to the $75,000 clause:

> "This means, I think, the value [of the yacht] at the beginning of the charter party" (Transcript, p. 356).

By the final decree it was

> "Ordered, adjudged and decreed, that the libelant recover from the respondent the sum of sixty-five thousand dollars ($65,000), with interest thereon from October 1, 1898, amounting to three thousand four hundred and eighty-eight $\frac{34}{100}$ dollars ($3,488.34), together with the sum of one hundred and forty-one $\frac{03}{100}$ dollars ($141.03) for his costs and disbursements as adjusted, amounting in all to the sum of sixty-eight thousand six hundred and twenty-nine $\frac{37}{100}$ dollars ($68,629.37)."
>
> *Transcript*, pp. 358, 359.

It appears from the opinion (*Transcript*, pp. 354–357) that the amount of the damage was arrived at by taking the figure $75,000 named in the old charter party, and deducting therefrom the sum of $10,000, which was the amount of the charter hire. The Court expressly states in reference to the $75,000 clause: "This means, I think, the value [of the yacht] at the beginning of the charter period."

Transcript, p. 356.

The evidence, therefore, as to the actual value, and consequently as to the actual loss, was entirely rejected, and the determination of the damages was arrived at by taking the figure named in the instrument as a starting point.

It is contended on the part of the petitioner that, assuming the two agreements to be binding upon it, they constituted an agreement only to secure the loss and damage " which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of the contract " —in other words, an agreement to pay *actual* loss or damage to the boat and *actual* loss or damage to the owner from non-performance of covenants ; that the sum of $75,000 mentioned therein must be regarded as in the nature of a penalty and not of liquidated damages ; and that by reason of these facts, assuming that a liability existed at all, it should be measured by the actual loss, or in case of the destruction of the vessel and failure to return it, by the *actual value* of the vessel.

The effect of any other interpretation is to make this respondent pay either $75,000, or, according to the trial Court, $65,000, for the loss of a boat eighteen years old, whose value, according to the rejected evidence, was stated to be $30,000—in other words, to pay from thirty-five to forty-five thousand dollars more than her value. Such an injustice resulting from an incorrect enunciation of the law, calls for reversal by the highest tribunal, not only from the importance of the principle which the Court has disregarded, but from the excessive hardship of the result and the magnitude of the sum which the respondent is called upon to pay.

On the question of the ratification by the defendant of the acts of Lord, Judge BROWN held that the circumstances " leave no doubt of the ratification by the defendant of Mr. Lord's acts, equivalent to an original authority."

Transcript, p. 354.

It is contended by your petitioner that the only ratification, if any, which can be predicated on the

act of the defendant, extended to the mere user of the vessel, and that assuming that the amount named, $75,000, is to be regarded as liquidated damages, there was no ratification of this and other oppressive terms of Lord's contracts, as there can be no ratification without knowledge.

Upon both the above points, the Circuit Court of Appeals held with the trial Judge as appears from the opinion.

Transcript, pp. 377–384.

Upon the argument before the Appellate Court it was "insisted for the charterer that the yacht perished without any fault on the part of those who were navigating her, and consequently that the case is one for the application of the principle well settled in the law of bailments, that the hirer is absolved from further obligation where the hired thing is destroyed without his fault, so that redelivery to the bailor is impossible," and the case of *Young vs. Leary* (135 N. Y., 569) was relied on in support of this contention. The Appellate Court, as appears by its opinion, admitted that such was the effect of the case cited, but overruled it on the authority of certain Massachussetts cases (Opinion, p. 5), and decided that the hirer was liable notwithstanding the destruction of the vessel and the consequent impossibility of its redelivery.

Upon the question whether the amount named in the instrument, namely, $75,000, should be considered as liquidated damages or as a penalty, the Court entirely disregarded the principle, repeatedly approved by the highest State courts and by the Circuit Courts of Appeals, as well as by many English decisions, that even though a sum is expressly stated in a contract to be liquidated damages, the Courts will disregard such a statement where the amount named is disproportionate to the presumable or probable loss, and will hold that the intention of the parties, notwithstanding the express language used, was to make the sum named a penalty.

The Court further held, apparently as matter of law, that it is impossible to ascertain the value of a yacht, stating that the Court " may take judicial notice that the market value of yachts is a very uncertain quantity " (*Opinion*, p. 6).

Finally, upon the question decided by the trial Court that assuming $75,000 to be the limit of liability, this amount should be reduced by the hire of the yacht—namely, $10,000—already paid by the defendant, the Appellate Court overruled the District Court by fixing the amount of the judgment at $75,000, compelling the charterer to pay altogether the sum of $85,000, when its liability had been expressly limited to $75,000 by the agreement upon which this action was brought.

It appears from the opinion (*Transcript*, pp. 355–357) that the Court below based its determination of the amount of the judgment upon the fact that the sum of $75,000 named in the two instruments was a " security or guarantee to the owner in the sum of $75,000 against any and all loss and damage which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms or conditions of this contract."

One of these terms or conditions was the covenant to pay the hire of the yacht—namely, $10,000—which sum was actually paid by the respondent, subsequent to the execution of the agreements, by which payment, in the language of the trial Judge, " so much of its obligation of $75,000 has, therefore, been discharged by 'The Sun' " (*Transcript*, p. 355). The opinion also refers to " the express provision of the second instrument, called the agreement of suretyship," " that in no case shall the liability of 'The Sun' exceed the sum of $75,000," and says: " Even if the two agreements be regarded as virtually one, as it would seem they must be, still this latter clause must control the general expressions preceding; and this leaves, after

"The Sun's" payment of $10,000 for the charter hire, but $65,000 principal as the limit of any further obligation on its part."

Transcript, p. 355.

It is contended on the part of the petitioner that, assuming the agreement of suretyship to be binding upon it, and that the sum of $75,000 is to be regarded as liquidated damages, both of which are denied, yet the trial Court was right in reducing the amount by $10,000, which the respondent had already paid in fulfillment of the liability covered by its bond; that the total liability of the respondent could not exceed the sum of $75,000; that by reason of these facts, assuming that a liability existed at all, in measuring which the evidence of actual loss, or in other words, of the actual value of the vessel was to be disregarded—assuming, in short, that every other point was decided against *The Sun*,—its liability could in no case exceed the sum of $75,000, and that any payment made by the respondent in satisfaction of its liability to the libellant, under the charter-party and the contract of suretyship, was to that extent a discharge of its entire obligation, which was in no case to exceed the sum of $75,000; and finally, that the trial Court was, therefore, correct in deducting from the total liability the sum of $10,000, which was the amount paid for the hire of the vessel.

The contention of the petitioner may be as summarized as follows:

FIRST. That if the petitioner is liable in any amount for the failure to re-deliver the vessel to her owners, or for her loss and destruction, he is liable to the libellant only for the fair market value of the yacht at the time of its destruction, and that the sum of seventy-five thousand dollars ($75,000) mentioned in the charter-party and in the agreement of suretyship, is to be regarded as a penalty, and not as liquidated damages.

SECOND. That as the charter-party herein provided for the delivery of the vessel at the port of New York in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, the destruction of the yacht or the thing to be re-delivered, without the petitioner's fault, pending the continuance of the contract, relieved the petitioner from the obligation.

THIRD. That the charter-party and agreement of suretyship were never authorized or ratified by the defendant corporation, and that all that was ratified was the hiring or user of the yacht, and not the extraordinary and oppressive provisions of the instruments as to which the minds of the libellant and the defendant corporation never met.

FOURTH. That in any case the liability of the defendant under the two instruments in question was expressly limited to $75,000, and if its liability should be found to equal this amount, the judgment herein should be reduced by the sum of $10,000 already paid under the charter-party.

The following assignments of error are relied on by the petitioner in the review of this case:

FIRST. As to the measure of damages for the loss or non-delivery of the vessel in case any damages are allowed.

As to this point, the trial Court refused to take into consideration any evidence of the actual value of the vessel, declaring that such evidence was reserved for future consideration in case any decree should be found for the libellant, and thereupon proceeded to make a decree for the libellant based upon the alleged valuation in the charter party without reference to the question of actual value. In other words, both the trial Court and the Appellate Court considered the sum of

$75,000 named in the agreements as liquidated damages, and not as a penalty. In reference to this point, attention is called to the following assignments of error:

"TWENTY-THIRD. It appears by the record that Court erred in holding that some effect must be given to the clause declaring that $75,000 shall be considered and taken as the value of the yacht, because the sum of $75,000 was not inserted in the agreement of suretyship as liquited damages, but was inserted as a penalty."

Transcript, p. 371; Opinion, *Transcript*, p. 356.

"TWENTY-FOURTH. It appears by the record that the Court erred in holding that the value fixed —namely, $75,000—should be taken as the agreed value of the yacht at the beginning of the charter."

Transcript, p. 371; Opinion, *Transcript*, p. 356.

"TWENTY-SEVENTH. It appears by the record that the Court erred in not granting to the defendant before final judgment an opportunity to show that the fair market value of the yacht "Kanapaha" was far less than $65,000 or $75,000."

Transcript, pp. 371, 372.

"FIFTEENTH. It appears by the record that the Court, in view of its express declaration that all evidence of value was reserved for a future hearing, erred in giving the respondent no opportunity to prove the value of the yacht "Kanapaha," or to prove that it had been grossly overvalued in the alleged charter party. This is shown by the following portions of the record:

"When Mr. Bartlett objected to a question propounded to Mr. Frank B. Jones, offered as an expert on the value of yachts—the question being: 'Will you state whether there is any market value

for steam yachts?'—the Court said: 'I sustain the objection, but all questions on damages are reserved; without prejudice to either party, the evidence is for the present excluded.'"

On page 241 of the Transcript Mr. Hughes said:

"MR. HUGHES: We ask for the purpose of this record that the testimony of Capt. Atkinson as to the valuation of the yacht "Kanapaha," and as to the value of other yachts, between pages 70 and 80 of his deposition be stricken out, save only the statement of Capt. Atkinson that a yacht has no market value.

"THE COURT: I shall strike out nothing from the deposition. I will note that, on this hearing, no evidence as to damages will be considered; that all such evidence is to be reserved for hereafter.

"MR. HUGHES: We do not ask that it be stricken out of the deposition, but that it be stricken out from this record, the deposition being in one aspect of the case entirely before your Honor.

"THE COURT: I rule that all the evidence in Capt. Atkinson's deposition relating to damages is not considered as received upon this present hearing, but that that evidence, and all other evidence on damage, is reserved for future consideration in case any decree should be found for the libellant.

"MR. BARTLETT: Evidence as to the condition of the yacht, all that stands, of course?

"THE COURT: Do you mean her seaworthy condition.

"MR. BARTLETT: Her general condition, yes.

"THE COURT: No evidence on the question of damages is considered at this time.

"MR. HUGHES: We understand that that includes the evidence as to the value of the yacht?

"THE COURT: Of course."

Transcript, p. 367; *Testimony of Frank Bowne Jones, Transcript*, pp. 243, 245; see, also, *Transcript*, pp. 281, 287.

"SIXTEENTH. It appears by the record that the Court erred in not considering and in not giving any force and effect to the evidence of Captain Stephen B. Atkinson that the yacht "Kanapaha" would not have sold in September, 1898, or at any time in the summer of 1898, prior to the accident, for $30,000."

Transcript, p. 369; *Deposition of Stephen B. Atkinson, Transcript*, p. 147.

"SEVENTEENTH. It appears by the record that the Court erred in not considering in not giving any force and effect to the statement of Captain Stephen B. Atkinson that the yacht "Kanapaha" in 1898 was a boat eighteen years of age, and that the said yacht had no new engines, no new saloons, and no new tubes, and had nothing new about her excepting the boilers.

"And that the said yacht had a low rate of speed, about eleven or twelve knots, and a large consumption of coal, and that she had no electric light plant and no ice plant, such as modern steam yachts always have."

Transcript, pp. 369, 370.
Deposition of Captain Atkinson, *Transcript*, pp. 142–144.

SECOND. The Court rejected the well-established principle that where an agreement provides for redelivery of the thing hired in good condition, the destruction of the thing to be delivered without the hirer's fault relieves him from the obligation.

In reference to this point reference is made to the following assignments of error:

"TWENTY-FIRST. It appears by the record that the Court erred in holding that the yacht having been a total loss, the defendant under the agreement in the charter 'to be liable and responsible for any and all loss and damage' as well as by the agreement to surrender the yacht 'in as good condition as at the start fair wear and tear from reasonable and proper use only excepted' as well as under the agreement of suretyship so called engaging that the hirer should 'well and faithfully perform and fulfill ever ything in and by said agreement on his part to be kept and performed' became liable to the libellant for his loss and damage through its failure to return the yacht on the first of October when the charter expired."

Transcript, pp. 370, 371; Opinion, *Transcript*, p. 354.

"TWENTY-NINTH. It appears by the record that the Court erred in granting a decree to the libellant for $65,000 with interest and costs."

Transcript, p. 372; Opinion, *Transcript*, p. 358.

THIRD. The petitioner never authorized or ratified the provisions of the instruments, except as to the hiring or user of the yacht. Upon this point reference is made to the following assignments of error:

"EIGHTEENTH. It appears by the record that the Court erred in holding that the alleged contracts, the charter parties or charters executed by Chester S. Lord, the Managing Editor of 'The Sun,' were legally the contracts of 'The Sun' the defendant."

Transcript, p. 370; Opinion, p. 352.

"NINETEENTH. It appears by the record that the Court erred in holding that Chester S. Lord had

such general authority as was sufficient to enable him to enter into these contracts or charters."

Transcript, p. 352.

"TWENTIETH. It appears by the record that the Court erred in holding that the Trustees and managing officers of the defendant had such general knowledge of his [Lord's] acts in hiring the yacht, and such perfect means of knowledge of all the particulars had they desired to know them, as to make their acts in using the yacht under the charters as they did a ratification of Mr. Lord's actions, and to bind them for the performance of his agreements made in their behalf."

Transcript, p. 370; Opinion, *Transcript*, pp. 352, 353.

"TWENTY-EIGHTH. It appears by the record that the Court erred in not holding that, even if there was a ratification by the defendant's trustees of the hiring of the yacht, there was no ratification by said trustees of the alleged valuation of the yacht at the sum of $75,000."

Transcript, p. 372.

FOURTH. Assuming that the views of the Trial Court are sustained as to the liability of the petitioner in the sum of $65,000, the Court of Appeals erred in increasing this amount by $10,000.

Opinion, Transcript, p. 383.

ARGUMENT.

Point I.

The Circuit Court of Appeals committed a fatal error in holding that the sum named in the two contracts—to wit, $75,000—was to be regarded not as a penalty but as liquidated damages; that for that reason judgment must be given for that amount, and that evidence of actual value, and, therefore, actual loss or damage, was not to be considered.

The provisions of the contract and bond which relate to this question, and upon which alone the opinion of the Circuit Court of Appeals is based, are as follows:

(1) Of the contract:

> "That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000, and the said hirer shall procure security or guaranty to and for the owner in the sum of $75,000 *to secure* any and all losses and damages which may occur to said boat, or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract."

(2) Of the bond:

> "FIRST. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed. * * *
>
> "THIRD. That our liability hereunto shall in no case exceed the sum of $75,000.

It will be observed that the two agreements are inartificially drawn; that their provisions are in

some respects obscure, and in others contradictory; that while it was apparently contemplated in the alleged charter-party that the so-called agreement of suretyship or guarantee should be executed by a party other than the party to the first agreement, it was in fact executed by the same individual, under the same designation; and they must, as the trial Court stated, be read together, so far as they can be.

Under these circumstances, and especially in view of the laxity in the construction of the agreements, the principle that courts of law must apply in construing a stipulation for liquidated damages as a penalty finds an additional justification.

Assuming that these instruments create any liability in this respondent, it is a liability upon a *quasi* agreement of indemnity, for actual loss and damage which may be sustained by the owner by reason of loss or damage to the boat and its belongings, and by reason of the breach of any of the terms of the contract. In such a case the sum named in the bond is regarded simply as a penalty, to which the total liability, ascertained from evidence of actual loss, is restricted.

In so far the bond is concerned, the sum mentioned is purely a penalty and can be regarded in no other light. The agreement is that the hirer shall faithfully perform all the covenants of the principal agreement, and that the liability of the surety shall be a sum which "shall in no case exceed the sum of $75,000." It does not say that the liability of the surety for any and all breaches, or even for any particular breach, shall amount to $75,000, but only that it shall not in any case exceed that amount. It is therefore in terms a penalty or a limitation of total liability to the amount named.

As to the provision in the principal contract that "for the purpose of this charter the value shall be $75,000," this can only relate to damages in case of a total loss for which, under the contract, the charterer might become liable. This is the only aspect in which

the vessel can have a value "for the purpose of this charter." There are no other conceivable conditions in which the question of a value "for the purpose of this charter" could arise. The provision, therefore, is equivalent to a provision for damages in case of a total loss of the vessel for which under the terms of the instrument the charterer may be held liable, or in case of the failure to return her under circumstances which render the charterer liable under the terms of the instrument. It is merely an ordinary provision in reference to damages in another form. Whatever it means, it certainly can be held to mean no more than this.

Assuming for the sake of the argument on this point, that the vessel was a total loss or was not returned to her owners, under such circumstances that the owner was liable for non-performance of the terms of the contract, and that the provision is intended as a stipulation for damages, we have to consider whether such a provision will in law be held to devolve upon the charterer a liability for the sum named independently of the actual value of the vessel or the actual amount of the damage, or whether the sum named is to be regarded as a penalty, and the damages are to be ascertained by proof of actual loss.

It was contended by the libellant that this was a valued policy of insurance; but this contention was itself rejected by Judge BROWN at the trial who said (*Transcript*, p. 357):

> "The valuation clause in marine policies of insurance is not analagous, I think, to this charter In such policies that clause has reference to a single object, namely, the rights of the parties upon a loss by sea peril. In this charter its object was to determine also the amount of security, which was designed to cover and does cover a multitude of particulars, as well as the important obligation to pay the charter hire."

The trial Judge is evidently correct in this statement. *This is not a valued policy of marine insurance.* It is really an agreement of indemnity to secure the performance of certain covenants, limited in amount to $75,000, with a disguised stipulation for liquidated damages in case of failure to redeliver.

The alleged charter-party provides that the hirer shall procure security in the sum of $75,000, against what?

FIRST.—To secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner,

(a) by reason of such loss or damage, and

(b) by reason of the breach of any of the terms or conditions of this contract.

This language certainly describes an ordinary agreement of suretyship with the sum of $75,000 as the penalty. The language could hardly be more explicit in confining the liability to actual loss and damage. It is to secure "any and all losses and damages *which may occur* to said boat," that is to say, actual losses and damages. It is "to secure any and all losses and damages which may be sustained by the owner by reason of such loss or damage." Here, again, it is actual loss and damage that is referred to.

Again, when reference is made to a breach of the terms and conditions of the contract, what is the bond to secure? It is to secure "any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner * * * by reason of the breach of any of the terms or conditions of this contract." In this case, also, where the loss or damage arises from breach of the terms of the contract, it is confined to actual loss and damage.

There are numerous covenants in the contract, some of which are contradictory of others, the breach of all

of which is covered by this security. Thus, there are the covenants (1) to pay rental; (2) to keep in repair; (3) to pay running expenses; (4) to surrender in good condition, wear and tear excepted; (5) to use only as a yacht; (6) to conform to the navigation laws; (7) to pay demurrage; (8) to be responsible for any and all loss and damage. The security of $75,000 was given for the performance of any or all of these covenants, and, as above shown, the actual loss and damage which may result to the owner from a breach. This language makes the amount of $75,000 an ordinary penal sum or penalty, and so far contradicts the idea of liquidated damages.

Both the trial Court and the Court of Appeals held that the damages for a total loss were fixed and determined by the sum stipulated in the greement as the value of the yacht. The question of actual value or actual damage was expressly excluded from consideration. Evidence was offered upon this point, but the trial Court refused to consider it (see Fifteenth, Sixteenth and Seventeenth Assignments of Error).

Judge BROWN stated in substance in his opinion that he used the stipulated sum of $75,000 as the figure to determine the damages, but he held that it was a penal sum, in that it limited the total liability, and should be reduced by the sum of $10,000, which had been already paid for the rental of the yacht. The Appellate Court reversed the decision, in so far that it refused to make the allowance of $10,000, and stood upon the broad ground that the sum named was liquidated damages.

In this way the libellant, under a contract which in substance secured him for loss or damage that he might actually sustain, obtained a judgment for $75,000 for the loss or non-delivery of a vessel which cost only $59,000 when first built, at a time when the cost of shipbuilding was very much higher than it is to-day—a vessel as to which it was proved by the rejected evidence that she was eighteen years

old; that she was only 125 tons net tonnage; that larger and better-equipped steam yachts could be built for $55,000; that no part of her structure or machinery had been renewed during the whole period of eighteen years in which she had been in use except the boilers; that she was lacking in the usual and necessary appliances to be found in modern steam yachts, and that if sold she would not bring more than $30,000. It thus appears that the respondent is required to pay for a boat which he had hired for six months, eighteen years old and of antiquated type—a sum more than double what is proved by uncontradicted evidence to be her actual value.

This conclusion is reached by the learned Court of Appeals expressly on the ground that the parties have stipulated an amount which is to be considered as liquidated damages. The Court would necessarily have reached the same conclusion, under its reasoning, if the amount at which the liquidated damages had been placed had been $500,000 or $1,000,000, for it held that

> "It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is, in the absence of fraud or mutual mistake, conclusive upon them" (Opinion, p. 382).

We contend that the true rule of law as set forth by all the highest authorities is precisely the reverse, and that the naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that, *if the amount is disproportionate to the loss*, the Court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically stated to be liquidated damages.

I.

IN A CONTRACT INVOLVING A PROVISION FOR THE PAYMENT OF DAMAGES IN CASE OF A BREACH THE SUM NAMED THEREIN, EVEN THOUGH EXPRESSLY STATED TO BE LIQUIDATED DAMAGES, WILL BE HELD TO BE A PENALTY IF THE SUM STIPULATED IS UNREASONABLE OR UNJUST, OR OPPRESSIVE, OR EXTRAVAGANT, OR DISPROPORTIONATE TO THE ACTUAL DAMAGES.

The general principle in reference to the question whether a sum stipulated to be paid for the non-performance of an agreement is to be considered as a penalty or as liquidated damages, is stated thus by Mr. Chief Justice MARSHALL:

> "In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties."
>
> *Tayloe vs. Sandiford*, 7 Wheaton, 13.

> "Nor can Courts enforce this rule without looking freely to the contract, not only as it appears upon its face, but the comparative value of the consideration and the thing to be performed as they did here in the principal case; for, if they confine themselves to the language of the parties, it is so easy to disguise the real case by fair words that the rule becomes nothing. The right to redeem from under the penalty (to be made fully effectual) must be held inherent in the contract, like the equity of redemption in a mortgage, and

not controlled by the express intention of the parties."

Spencer vs. Tilden, 5 Cowen, 151, n.

"Courts have felt embarrassed when called upon to enforce inequitable, harsh or oppressive provisions in contracts, inserted often without reflection or a full knowledge of their legal effect, by a laudable desire to harmonize the abstract principles of right and justice with the established legal rules that parties are at liberty to make contracts for themselves, and that it is the duty of courts to enforce them as made. By a liberal use of the element of supposed intention they have been enabled to do so to a reasonable extent. * * * For the purpose of this case we must regard the provision as a penalty."

Noyes *et al.* vs. Phillips, 60 N. Y., 411.

No better illustration of the application of this principle can be cited than the leading case of Gay Mfg. Co. vs. Camp, 1895, 13 C. C. A., 137, at p. 141, *et seq.*

After a decision in this case by three judges, at the Circuit Court of Appeals for the Fourth Circuit, a petition for a rehearing was considered and denied by the Circuit Court of Appeals at another term, the Court consisting of the Chief Justice of the United States, and GOFF and SIMONTON, JJ. It has, therefore, been concurred in by five judges.

Gay Mfg. Co. vs. Camp, 25 U. S. Appeals, 376.

In this case a lease had been made by the Receivers of the plaintiff to the defendant of certain mill property at a rental of $10,000 per annum. The lease stipulated that in case of a breach by the lessees,

"in lieu of all such claim for loss or damage, the sum of five thousand dollars is now hereby esti-

mated, assessed and accepted between the parties hereto *as liquidated damages* to be paid by the parties of the second part unto the party of the first part which the parties of the second part hereby declare to be due and promise and bind themselves to pay unto said party of the first part or its assigns immediately upon the termination or annulment, or declaration of the termination or annulment, of this contract by the party of the first part."

No language could be more explicit and more emphatic than this. The sum of $5,000 is stated to be "estimated, assessed and accepted between the parties hereto as liquidated damages." Not only that, but it is a sum "which the parties of the second part hereby declare to be due and promise and bind themselves to pay" upon the arising of the condition. The designation of liquidated damages and the express promise to pay the sum named could not be more explicit.

Before the expiration of the term the lessees defaulted in the payment of the rent, and on this default the lessors entered. Subsequently the amount of the rent due, which was about $2,500, was paid. The question arose, as stated by the Court: "Are the lessors entitled to the payment of $5,000 as liquidated damages under these circumstances?" As to this, the Court said:

"This will depend upon the question: Is the sum of $5,000 inserted as a penalty or as liquidated damages? 'Upon this subject,' says DEADY, J., in *Harris vs. Miller*, 6 Sawy., 311; 11 Fed., 118, 'the law is peculiar, *and, instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.*'

"In *Spencer vs. Tilden*, 5 Cow., 150, the Court says: 'This doctrine, *which converts damages ap-*

parently stipulated or fixed by the parties into a penalty, came from the civil law through the Court of Chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, Courts must *disregard the particular expressions of the parties;* if for the moment we agree that a party may, by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specific default, secure the whole to himself without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal.'

"The rule laid down in *Barton vs. Glover*, Holt, N. P., 43, is: 'When a sum of money, whether in the name of a penalty or otherwise, is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed or contract and the penalty as the accessory, and therefore only to secure the damages really incurred.' * * *

"The principle * * * is that the circumstances of each case determine whether the sum stated be liquidated damages or a penalty; and this without regard to the words used, perhaps sometimes in disregard of the intent of the parties, and whenever it appears that the damages occasioned are easily estimated in money, the covenant is construed as a penalty. 'The subject

matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damages would be difficult if not vain, then the courts will incline to give the relief which the parties have agreed to. But if, on the other hand, the contract is such that the strict construction of the phraseology *would work absurdity or oppression*, the use of the term 'liquidated damages' will not prevent the Court from inquiring into the actual injury sustained and doing justice between the parties. *(1 Pomeroy, Eq. Jur.*, Secs. 433, 444*)*. It is quite impossible for any substantial damage to have resulted from the annulling of the lease a few days before the expiration of its term, and the exaction of a penalty of $5,000 as the consequence of such default would be grossly excessive and inequitable. The judgment of the Circuit Court is affirmed, with costs.

Gay Mfg. Co. vs. Camp, 13 C. C. A. 137 (65 F. R., 794).

So entirely is the language of the contract disregarded that in the case of East Moline vs. Weir Plow Co. (decided by the United States Circuit Court of Appeals for the Seventh Circuit, 1899, 37 C. C. A., 62), where the agreement not only expressly stated (p. 65) "that the measure of damages for the default of either party to carry out this agreement shall be $50,000," but each party alleged default on the part of the other and claimed the entire sum—namely, $50,000—as liquidated damages, of course, involving an admission on both sides that such was the true interpretation of the contract. Notwithstanding the express statement in the agreement as to the measure of damages, and notwithstanding the mutual claim and the mutual admission made by both parties that such was the meaning of the contract, the Court, when it found for the de-

fendant on its counter-claim, refused to consider the amount named as anything but a penalty.

Equally clear and forcible is the statement of the principle in the case of *Ward vs. The Hudson River Building Company*, 125 N. Y., 230 (decided in 1891 by the New York Court of Appeals). In this case plaintiff had contracted to build four houses by a certain date, and that he should "pay to the owner ten dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated damages." After the default had continued for a considerable time, a new agreement was made, as follows:

> "It is mutually agreed that the sum, or penalty, due under said contract on March 25, 1888, shall be $1,540 by way of liquidated damages, unless four villas and all extra work are then entirely finished" (p. 233).

and the contract then contained the following furthe agreement:

> "It is further mutually agreed that in case said Ward fails to complete said villas on or before said 25th day of March, 1888, as aforesaid, there shall be due and owing to said Hudson River Building Company, its successors or assigns, the sum of $1,540 by way of liquidated damages, etc." (p. 232):

and there we find the rule laid down by Judge GRAY as follows:

> "Whether the sum agreed between parties to be paid, in the event of a breach of some agreement is termed by them a 'penalty,' or 'liquidated damages,' is not controlling upon the question of construction. Their use of such words is not always conclusive as to their legal meaning. To get at that we must consider the subject matter

and nature of the agreement and understand clearly the intention of the parties. If it shall then appear that the damage and loss which may be presumed to result from non-performence are uncertain and incapable of exact ascertainment, then the payment or liability fixed by them must be deemed to be liquidated damages and recoverable as such. *Where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportionate to the presumable or probable damage or to a readily ascertainable loss, the Courts will treat it as a penalty and will relieve on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance.*"

The principle is here again distinctly stated that, notwithstanding a sum *has been stipulated as a payment for non-performance by the defaulting party*, if it is disproportionate to the presumable damage or loss, the Courts will treat it as a penalty.

In the present case the Court not only refused to consider the question whether the amount stipulated was disproportionate, but they actually refused to consider any evidence from which the amount of presumable or probable loss could be inferred. They threw out the question of presumable, probable or actual loss altogether, and the libellant was not required to prove actual loss, nor was the respondent allowed to prove it as against the sum named in the contract,

To the same effect says Sedgwick :

"SEC. 396. *General Observations.* * * *

"Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points : First, the language employed ; second, the subject matter of the contract ; and, third, the intention of the parties. These are indeed the great ele-

ments of interpretations of all contracts. But in the case we are now examining the courts, especially in this country, have generally shown a marked desire to lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. *The language of the contract is not controlling.* And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex.* * * * But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties (see Noyes vs. Phillips, 60 N. Y., 408)."

Sedgwick on Damages (8th Ed.), Vol. 1, p. 558.

SEC. 407. *The liquidation must be reasonable.* The parties, then, must not only intend that the sum named shall be paid over to the plaintiff upon the breach, the sum must also be reasonable in itself (People vs. C. P. R. R. Co., 76 Cal., 29; Perzell vs. Shook, 53 N. Y. Superior Court, 501; Sleeman vs. Waterous, 23 Up. Can. C. P., 195). In other words, in every case where a fixed sum is stipulated as damages, the Court will look to see whether the stipulated compensation is a reasonable one; and if not, they will require damages to be assessed as if no stipulated sum were named in the contract. In the words of the Supreme Court of Michigan: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside" (MARSTON, J., in Meyer vs. Hart, 40 Mich., 517–523).

So firmly is this principle applied that the liquidation provided by a contract may, as the circumstances show to be equitable, in one case be upheld, and in another set aside. Thus in Hahn vs. Horstman, 12 Bush, 249, a case of common building contract, which stipulated damages at the rate of twenty dollars a day for a delay in completing the contract, the defendant left the work unfinished ; and the plaintiff more than a year after the time for completion, brought suit, claiming damages for the whole time at the stipulated rate. If the work had been finished, though a few days after the agreed time, it is well settled, as will be seen, that the stipulated sum could be recovered. In this case, however, to allow recovery at the stipulated rate would be grossly in excess of compensation ; and the Court refused to allow damages at the stipulated rate (Acc. Greer vs. Tweed, 13 Abb. N. S., 427 ; Colwell vs. Foulks, 36 How. Pr., 306). Some courts say that the damages must not be "grossly excessive" (Parr vs. Greenbush, 42 Hun, 232) ; some that they must not be "unjust and oppressive" (Scofield vs. Tompkins, 95, Ill., 190 ; Mueller vs. Kline, 27 Ill., App., 473 ; Higginson vs. Weld, 14 Gray, 165). "Unreasonable" (Hardee vs. Howard, 33 Ga., 533 ; Sutton vs. Howard, 33 Ga., 536 ; Maxwell vs. Allen, 78 Me., 32 ; Daly vs. Maitland, 88 Pa., 384 ; Williams vs. Vance, 9 S. C., 344 ; Schrimpf vs. Tenn. Manuf. Co., 86 Tenn., 219). "Extravagant" (Gammon vs. Howe, 14 Me., 250), or "disproportionate" (Jaqua vs. Heddington, 114 Ind., 309 ; Haymaker vs. Schroers, 49 Mo., 406 ; Staples vs. Parker, 41 Barb. 648). But all seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach (Tholen vs. Duffy, 7 Kas., 405 ; Stearns vs. Bar-

rett, 1 Pick., 443 ; Gowen vs. Saltwarsh, 11 Mo., 271 ; Dennis vs. Cummins, 3 Johns. Cases, 297 ; Burrage vs. Crump, 3 Jones L., 330 ; Pennypacker vs. Jones, 106 Pa., 237 ; Jones vs. Queen, 7 Can., 570). Thus, where a contract of hiring provided that, on the servant leaving without notice, whatever was then due to him should be considered as liquidated damages for the breach of his contract, it was held that the forfeiture would not be enforced by the courts. Since the arrears of wages might be large or small, the principle of compensation was clearly departed from by the parties (Richardson vs. Woehler, 26 Mich., 90 ; Schrimpf vs. Tenn. Manuf. Co., 86 Tenn., 219 ; Jones vs. Queen, 7 Can., 570). But the forfeiture of a fixed reasonable sum would be allowed. (Richardson vs. Woehler, 26 Mich., 90 ; Schrimpf vs. Tenn. Mfg. Co., 86 Tenn., 219 ; acc. Jones vs. Queen, 7 7 Can., 570).

SEC. 408.—*Language not Conclusive ; Rule in Case of Doubt.* It follows from what has been said that the language of the contract is not conclusive. The question whether a stipulated sum is to be allowed as liquidated damages is a question of law, and no agreement of the parties to call it a penalty or liquidated damages can decide the question *(Jaquith vs. Hudson, 5 Mich., 123–136).*

SEC. 410.—*Penal Sum Collateral to Object of Contract.*

Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages. In a contract for the sale of land for $8,000, payable $5,000 on the first of January following, and the rest in three annual installments, a clause stating that, "in further confirmation of the said agree-

ment, the parties bind themselves, each to the other, in the penal sum of $1,000," is not to be considered as liquidated damages for the breach of this agreement, but as a penalty superadded (Robinson vs. Cathcart, 2 Cranch. C. C., 590; acc., Richards vs. Edick, 17 Barb., 260; Law vs. House, 3 Hill [S. C.], 268).

Sedgwick on Damages (8 ed.), Vol 1, p. 583–6.

The disproportionate or oppressive amount of the sum named as liquidated damages has always been taken into consideration by the Court. Says the Court of Appeals in *Coldwell vs. Lawrence*, 38 N. Y., 74:

> " It is scarcely to be suppose that the parties intended to fix an amount so extravagant, and which would be, if allowed as claimed, so grossly disproportionate to the actual damages, as liquidated damages for so trivial an omission or delay, and I cannot discover any sufficient and satisfactory reason for any such inference or conclusion."

In *Peekskill R. R. Co. vs. Peekskill*, 21 App. Div., 94 (October Term, 1897), while the sum named as liquidated damages was held to be such by the Court, one ground of its decision was that " the sum does not seem to be unreasonable in amount or disproportionate to the actual damage which may have been sustained." The Court further says, referring to the various stipulations for damages in breaches of contract:

> " In some of them, although the stipulation in words provided that the sum specified should be regarded as liquidated damages, the Courts construed it as meaning a penalty. But this was done to prevent great injustice being worked and relieve from justice."

The principle is therefore one of active and constant application in the courts to-day.

It will be seen that the New York Court of Appeals, like the United States Circuit Court of Appeals in the Fourth Circuit, disregards the fact that "a sum has been stipulated as a payment by the defaulting party." This fact is overridden not, as in this opinion, merely "by fraud or mutual mistake," but by a totally different consideration—namely, that the amount is disproportionate to the presumable or probable damage.

> "The question whether the sum stipulated is to be paid as a penalty or as liquidated damages * * * depends on a construction of the whole instrument, upon the real intention of the parties as ascertained from all the language they have used, from the nature of the act to be performed, from the consequences which naturally result from a violation of the contract, and from the circumstances generally surrounding the transaction. * * * *It is well settled that if the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty.*"
>
> Vol. I., Pomeroy Equity Jurisprudence (2d Ed.), Sec. 440, *citing* Harris vs. Miller, 11 F., 118.
> Dimech vs. Corlett, 12 Moore P. C. C., 199.
> Jones vs. Green, 3 Younge & J., 304.
> Green vs. Price, 13 Mees. & N., 701; 16 *Id.*, 346.
> Beets vs. Burch, 4 Hurl. & N., 511.
> Cushing vs. Drew, 97 Mass., 445.
> Wallace vs. Carpenter, 13 Allen, 19.
> Lynde vs. Thompson, 2 *Id.*, 456.
> Streeper vs. Williams, 48 Pa. St., 450.

"The amount of the sum may always be taken into consideration as an aid to the Court in determining the intention of the parties; and, if it be altogether excessive, this may turn the scale in favor of declaring it intended as a penalty."

Pomeroy, Eq. Jur., 2 Ed., Vol. I., Sec. 440.

"In determining whether an amount named in a contract is to be taken as a penalty or liquidated damages, Courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent. Where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; * * * and, again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the Courts have carried out the intent only so far as it was right and reasonable."

Davis vs. United States, 17 C. of C., 201.

It has been stated that the valuation clause in the charter-party can mean nothing more than a provision for damages in the case of a total loss or non-delivery for which the charterer is liable. It is by no means clear, however, that in any aspect the language could be equivalent to the phrase "liquidated damages." Even if this phrase had been actually used, the Courts, according to the decisions above cited, would disregard it where it would work injustice; but it is not clear that the provision of the contract can be treated as the equivalent of this phrase. As pointed out by the learned trial judge (Opinion, p. 355):

"It is noticeable, however, that neither in the immediate context, nor anywhere in the charter or in the agreement of suretyship, is there any agreement that the sum of $75,000 should be paid for the failure to return the yacht at the end of the charter period. That clause in the charter, on the contrary, stands in immediate connection with, and seems to be, the inducement to the further clause by which the hirer agrees to 'procure security or guarantee to the owner in the sum of

> $75,000 against any and all loss and damage which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of this contract."

In the case of Gay Mfg Co. vs. Camp above cited, there was an express promise to pay the liquidated damages, yet the Court held that the sum stipulated should be considered merely as a penalty. There is far greater reason for so holding as to the language of the contract here, for the reference to the sum of $75,000 as security for loss and damage "which may be sustained by the owner" points plainly to the determination of actual loss as a measure of damages. So also does the language of the so-called contract of suretyship, which Judge BROWN holds must be "regarded as virtually one" with the principal contract. The agreement is that "in no case shall the liability exceed the sum of $75,000" Both these provisions that the $75,000 shall be security for the loss "which may be sustained by the owner" and that the liability "shall not exceed the sum of $75,000" distinctly negative the idea of liquidated damages, and call for a determination of actual damages, as in the ordinary case of a penalty in a bond.

In Watts vs. Camors, 115 U. S., 353, this Court, in an opinion by Mr. Justice GRAY, held, in reference to a penal sum named in a charter party:

> "At the common law, indeed, before the Statute of 8 & 9 W. 3, Ch. 11, Sec. 8, judgment might have been rendered for the full amount of the penalty, but in a case like this a court of equity would stay proceedings at law on payment of the damages actually suffered, and at the present day even a court of law would regard such a clause in such a contract as a penalty only and not as liquidating the damages.

The learned Justice goes on to say:

> "In such cases, accordingly, the Courts of the United States, sitting in admiralty, award the damages actually suffered whether they exceed or fall short of the amount of the penalty (citing The Salem's Cargo, 1 Sprague, 389; The Marcella, 1 Woods, 302). In England and in this country a court of admiralty, within the scope of its powers, acts upon equitable principles, and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief."
>
> Watts vs. Camors, 115 U. S., 353.

Although the above case is not precisely similar to the the case at bar, the observations quoted from the opinion are applicable.

> "In considering whether a stipulation to pay a sum of money on breach of condition is to be treated as a penalty or as liquidated damages, the test to be applied is whether the loss which will accrue to the plaintiff from an infringement of the contract can or cannot be accurately *or reasonably calculated in money*, antecedently to the breach. *If it can be so calculated, then the fixing of a larger sum of money will be treated as a penalty.* Where the loss is *absolutely uncertain* it will be treated as liquidated damages."
>
> Mayne on Damages (5th Ed., 1894), p. 148.
> Charleston Fruit Company vs. Bond, 26 F., 18.

In applying the foreging rules to this case,

> "it must be remembered that a charter party is an informal instrument, as often as otherwise, having inaccurate clauses, and that on this account

they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade."

Raymond vs. Tyson, 17 How. (U. S.), 53, citing, Abbott, Shipp., Story's Ed., 188.
Kent, Vol. III., Ch., 47.
Ruggles vs. Bucknor, 1 Paine, 358.
The Volunteer, 1 Sumn., 551, per STORY, J.
Disney vs. Furness, 79 F., 810.

And that in the exercise of their jurisdiction with respect to such bonds,

"Courts of Admiralty act upon enlarged principles of equity rather than the strict rules of common law."

O'Brien vs. Miller, 168 U. S., 287, 297.

II.

IN ORDER TO APPLY THE RULE THAT A STIPULATION FOR DISPROPORTIONATE DAMAGES WILL NOT BE ENFORCED, EVIDENCE OF SUCH DISPROPORTION MUST BE ADMITTED.

The above citations establish the principle that whether a sum stipulated in a contract to be paid for non-performance is called "liquidated damages" or is called a "penalty," the courts will always hold it to be a penalty where the sum named is disproportionate to the actual loss incurred by the breach.

In the present case the trial Court not only disregarded this rule, but it refused to consider the evidence which was presented to it going to show the actual value of the yacht, and, therefore, the actual loss which the libellant had incurred. It not only disregarded the rule as to the effect of dispropor-

tion between the sum named and the actual loss, but it refused to receive any testimony which would enlighten it as to this disproportion. How is the Court to know whether a sum stipulated is exorbitant or extravagant unless it receives evidence of the actual value of the thing in question? Instead of acknowledging and applying the principle that a provision for liquidated damages must be tested by its reasonableness in reference to actual loss, the Court shut its ears to any and all evidence which would enable it to apply such a test. The statement had been made by competent witnesses that the yacht would not have realized $30,000; that she was 18 years old; that nothing had been renewed upon her during her lifetime except the boilers; in short, that she was an antiquated vessel of her type (pp. 142–147). The Court not only refused to consider this evidence but refused to consider any evidence as to damages, and thereby cut itself off from any possibility of determining the question whether the sum stipulated was disproportionate or not. The Court therefore not only failed to apply the well-recognized rule of law, but committed the further error of refusing to receive any evidence which would enable it to make such an application.

The refusal of the Court to consider any question of actual damages or actual value of the yacht, when evidence was offered to prove that this value was grossly disproportionate to the sum named in the contract, was error, and upon that ground, if on no other, the decree and judgment should be reversed.

III.

THERE IS NO GROUND IN THE PRESENT CASE FOR CONSIDERING THE STIPULATED SUM AS LIQUIDATED DAMAGES ON ACCOUNT OF ANY SUPPOSED DIFFICULTY IN DETERMINING ACTUAL DAMAGES.

The only foundation which the Courts have allowed for holding that a stipulated sum in a contract shall be considered as liquidated damages, and not as a penalty, is that the actual damages are incapable of ascertainment. In such a case it is said that the parties may stipulate for a fixed sum which shall be considered as liquidated damages. The reason of the rule is plain. Where damages cannot be fixed with reasonable exactness, it is competent for the parties to agree upon a certain sum beforehead which shall be an approximation to the actual damages by which they shall both be bound.

This principle, however, must be understood with the qualification, which is universal and absolute, that the amount so fixed shall be reasonable and not out of proportion to the actual loss.

Ward vs. Hudson River Building Company, 125 N. Y., 230 (referred to above).

The Circuit Court of Appeals held, as a fact of which the Court could take judicial notice, that the market value of a yacht—not only this yacht, but any yacht—was an " uncertain quantity " *(Opinion*, C. C. A., p. 6*)*, and that from this assumed " difficulty of estimating exact damages, the intention of the parties to consider it as liquidated damages may be inferred " (p. 7).

The rule by which a Court may regard the sum mentioned in a contract as liquidated damages, rather than as a penalty, by reason of the impossibility of ascertaining actual damages, is a familiar one; but we doubt if it has ever been applied before, as the Circuit Court

of Appeals applies it, to the question of determining the value of a specific vessel. The Court apparently holds that, as matter of law, the value of a steam vessel of this character is not ascertainable. No authority can be referred to which makes such an extension of the principle.

In the case of the *East Moline Co. vs. Weir Plow Co.* (Seventh Circuit, June 6, 1899), 37 C. C. A., 62, this question received considerable attention. As already stated, the provision of the agreement in that case was " that the measure of damages for the default of either party to carry out this agreement shall be $50,000." The decision turned specifically upon the application of this provision to a number of different acts of default of varying importance, but the Court held that such a provision as that stated in the contract could only be considered as liquidated damages (p. 68) " where it is evident that the damages for a breach would be uncertain in their nature and impossible of ascertainment by a jury ; " or, again, " where the damages for such a breach being entirely uncertain and speculative in character ; " or, again, " where the damages for a non-performance * * * are not measurable by any exact pecuniary standard." The last phrase occurs in the case of *Trower vs. Elder*, 77 Ill., 452, cited with approval in the *East Moline* case.

> " In general, where the contract is for the performance or non-performance of some other act than the mere payment of money, *and there is no certain measure of the injury which will be sustained from a violation of the agreement*, the parties may, by an express clause inserted for that purpose, fix upon a sum in the nature of liquidated damages which shall be payable as a compensation for such violation."
>
> Vol. I., Pomeroy, Equity Jurisprudence, 2d Ed., Sec. 440.

In a contract in which certain acts are to be done or omitted, and the contract is of such a nature that the

actual damages are *susceptible of computation in money*, and the sum is named in the contract as a penalty or forfeiture for a violation, it is to be viewed *as a penalty* and not as liquidated damages, and in such case the *actual damages* sustained will constitute the rule of recovery.

* * * There are many cases in the reports to the effect that, though the sum named is called liquidated damages, it will be held as a penalty if it seems from the contract that it was so intended by the parties and the justice of the case requires such a construction."

White vs. Arleth, U. S. Cir. Ct. So. Dist. of Ohio, 29 Fed. Cas., 978.

In the case of "The Marcella," the owners of the boat made a certain contract for transportation and agreed "to forfeit the sum of $1,000" if they failed to carry out the contract. The United States Circuit Court for the District of Louisiana (Mr. Justice Woods) held that the sum named was a penalty and not liquidated damages, and that no part of it could be recovered as damages unless actual damages were shown, regarding the case as one in which the damages sustained by a breach could without difficulty be ascertained.

Taylor vs. "The Marcella," 23 Fed. Cas., 782.

An examination of the cases which hold that damages shall be considered as liquidated "where it is evident that they would be uncertain in their nature and impossible of ascertainment by a jury" or "speculative in character," or "not measureable by any exact pecuniary standard" shows that they apply to an entirely different state of facts from that presented here.

Thus in *Bagley vs. Peddie*, 16 N. Y., 469: Here the bond was stated to be "in the sum of three thousand dollars, as liquidated damages and not by way of penalty, or otherwise," for the performance of the covenants in a written agreement. One of the coven-

ants was "not to reveal the secrets of a trade in which the principal obligor was to be employed," &c., and it was held "that a breach of this covenant involved damages so uncertain and difficult to be ascertained as that the sum named in the bond should be deemed not a penalty but liquidated damages."

In *Dakin vs. Williams*, 17 Wend., 447, the defendant, having sold out his business, agreed not to carry it on in the county and fixed and liquidated $3,000 as the damage if he violated that provision. This was held to liquidate the damage, because the real damage was uncertain.

Among the other cases where damages were held to be uncertain, and, therefore, supported an agreement for liquidated damages, was one for damages for not assigning a lease *(Knapp vs. Maltby*, 13 Wend., 587*)*; an agreement not to carry on the business of perfumery in London *(Price vs. Green*, 10 Mees. & Wells., 346*)*; an agreement of one attorney with another not to carry on the business of attorney within fifty miles or interfere with or solicit the clients of the late copartnership *(Galsworthy vs. Strutt*, 1 Wells., Hurl. & Gord. Exch. Reps., 659*)*; the failure to complete four houses on the day specified *(Ward vs. H. R. B. Co.*, 125 N. Y. 230*)*.

On the other hand, a refusal to abide by an arbitrator's decision, when the decision made a money award, was held to be certain *(Spear vs. Smith*, 1 Denio, 464*)*. In *Kemble vs. Farren*, 6 Bing., 141, a manager brought suit against an actor for a violation of an agreement to perform at Covent Garden for four years. The plaintiff had agreed to pay the defendant a fixed sum every night the theater should be open. The agreement provided for a payment of "one thousand pounds liquidated damages, and not as a penalty or penal sum, or in the nature thereof," for a default by either of the parties in any provision of the agreement. The default was on the part of the actor, and the question arose as to whether the clause providing for liquidated

damages was not supported by the uncertainty of the agreement; but the Court held that, as a certain sum was to be paid to the defendant, the agreed damages could not have been considered otherwise than as a penalty as to such fixed sum, and must be construed in the same way in respect to those covenants of which the breach would result in uncertain damages.

The above cases illustrate the nature of the distinction between certain or ascertainable and uncertain or speculative damages, in other words, damages for non-performance of a contract which are or are not "measurable by any exact pecuniary standard." The damage suffered by the practice of a rival in business, by the failure to assign a lease, by the revelation of trade secrets, is clearly of such an uncertain character. In such cases, it may well be that the parties, knowing the impossibility of determining what loss will result from a breach, may stipulate beforehand upon a reasonable sum, which shall be assumed to measure the loss.

The present case is not of this character. Here the damage is the loss of a certain vessel, which cost a certain ascertainable sum to build, which had been in use a certain number of years, and which had suffered a certain deterioration. That the value of such a vessel should be put in the same category as the effect of competition in business, or of the revelation of trade secrets; that it should be decided, as matter of law, to be unascertainable, to be not measurable by any pecuniary standard is, we submit, an absolutely novel proposition. This is not a question of damages for loss of use. It is a question of damages for the loss of a ship. The fact that the ship is a yacht makes no difference. It is a specific article, the product of one of the ordinary forms of manufacture, and the cost of manufacture of this article is readily ascertainable; the value of the materials and labor which enter into its construction are determinable with the utmost facility. There are great numbers of persons who are

entirely competent to give evidence as to the value of such a vessel. It is as readily ascertainable as the value of any other product of manufacture. It is not even an unusual or uncommon product of manufacture. The question of fluctuations in value does not here arise. The only question is: "What was the value of the yacht, assuming her continued existence, at the time she was required to be redelivered?" Her master said $30,000, and doubtless other estimates might have been made, as is frequently the case where questions of value arise in courts of law, but the question is, nevertheless, one which, in such a court, would undoubtedly have been considered a proper question for the jury. Certainly a maximum value could have been ascertained, which this respondent has a right to contend should be a limit of liability. Nor would it occur to any one, in so submitting the question of value to a jury, that it was one which a jury could not determine by any exact pecuniary standard. In an age and country where juries in every great city are daily called upon to determine, and do determine, the damages for the loss of a leg, or an arm, or any other member, for the obscure consequences of disease or wounds, for a loss of human reputation or a loss of human life, it seems idle to say that, as matter of law, a jury could not determine the value of a yacht.

There is no such uncertainty about the value of a given vessel as there might be in the case of the losses or defaults above referred to. It can be shown as already stated, that the "Kanapaha" was built by the Cramps in 1880 at a cost of $59,000, and that she was sold four years later for $50,000; that during this period of 18 years no substantial repairs had been made upon her; that she was an old vessel, destitute of modern improvements, and that she would not sell for more than $30,000.

Great stress was laid in the argument below upon the effect of the covenant to keep in repair in this alleged charter-party, in its bearing on the rule in Young

vs. Leary, and similar cases. This obligation to keep in repair is alleged to have extended to various parts of the vessel; and there was the further covenant that "the hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like." Will it be contended, in the case of a breach of the covenant to keep in repair some of these items, that if suit had been brought to recover the loss and damage upon such items not so kept in repair, there would have been any difficulty in determining the value of each of the items? If a crank shaft had broken, the cost of the crank shaft would have been readily ascertainable. If the bows of the vessel were stove in, the cost of the repair of the injury could be exactly determined. If a mast, or a smokestack, or a part of the frame, or a rudder, or the plates in the hull had to be replaced, the measure of damages would be the cost of replacing them, and nobody would contend for an instant that this cost could not be fixed with exactness.

The same principle applies to the vessel itself. No one can pretend but that any shipbuilder could have duplicated this craft, and that the sum of money for which she could have been duplicated could be precisely determined. In view of this fact it is idle to say that the actual loss is not ascertainable. It is equally clear that it is disproportionate to the sum stipulated. Judging from the fact that she cost $59,000 new in 1880, at a time when the cost of shipbuilding was vastly greater than it is to-day, she could readily have been duplicated as a new ship for much less than that figure. If a new ship could have been built which was in every respect the duplicate of the lost yacht, except that the new ship was new while the lost yacht was 18 years old, and could have been built for about half the amount which this petitioner is now called upon to pay—namely, $75,000—the imposition of that sum as a measure of damages is grossly dispropor-

tionate to the actual loss, and is the very kind of inequitable contract from which the Courts have always relieved the contracting party.

IV.

THE SUGGESTION THAT NO MARKET VALUE CAN BE DETERMINED FOR A YACHT CANNOT BE SUSTAINED.

The contention has been made, on behalf of the libellant, that a yacht stands in a different position as to the determination of market value from other manufactured articles ; that, the question not being governed by the ordinary laws of demand and supply, a stipulated sum may be taken as liquidated damages in the case of the loss of a yacht where it would not be so taken in the case of the loss of any other specific object. This contention impressed the Appellate Court so strongly that they were led into the remarkable statement that "the fact is one of which the court may take judicial notice that the market value of yachts is a very uncertain quantity." Stress is also laid upon the fact that Captain Atkinson stated in his testimony, as a general proposition, that yachts have "a fancy value."

The obvious answer to this contention is that a yacht is the product of a manufacture in which great numbers of persons are engaged in competition ; that the materials which enter into its construction are all common articles of merchandise having definite values, and that it is as easy to determine upon the ordinary principles of mercantile and manufacturing valuation what the cost of a given steam vessel shall be as it is to determine the cost of any other manufactured product. The mere fact that an article or a structure may be re-

placed in the ordinary way of trade and manufacture is sufficient to establish this fact. That yachts are generally built to order and not to be kept in stock for sale to the general public does not affect the question. The same is true of nearly all steam vessels. The fact that yachts differ in their interior details is unimportant. This fact is also true of all steam vessels. The essential point is that every item in the cost of construction of the yacht has a determinable market value, and the cost of the yacht as a whole has such a determinable value.

This principle has been substantially established by the Supreme Court of the United States in the case of The Conqueror, 166 U. S. 110. In that case the question which arose directly was a question as to the value of the *use* of a yacht, which is a very different question from the value of the yacht itself. Referring to the difficulties of this question Mr. Justice BROWN said :

> "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, *as it is only in the larger ports that there can be said to be a market price for the use of vessels*, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.
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> * * * * * *
>
> "The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was

made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of Sturgis vs. Clough passed, too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much greater certainty than it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market."

The Conqueror, 166 U. S., pp. 127 and 134.

This Court, in passing upon the question, did not disturb the conclusions as to damages for the loss of use of the yacht reached by the Court below. It is quite evident, however, from the language of Mr. Justice BROWN in the opinion, that, while there might be some difficulty in ascertaining the damage consequent upon the loss of use for a period of time, although not an insuperable difficulty, there would be no difficulty at all in determining the value of the yacht itself, especially in the larger ports.

Nor is there any difficulty in determining the effect to be given to Captain Atkinson's statement in evidence that yachts have in general a "fancy value." Of two intending purchasers, one may be willing to give more than another for a particular yacht, because the yacht suits his particular necessities, and there may, therefore, be a greater range in obtainable prices than there would be in the case of articles where the fancy of individual purchasers entered less into consideration. But whatever may be the range of such prices, it is certainly possible in every case to fix a maximum value of such a vessel, and the maximum value can in no case be more than the cost of duplication, less the wear and tear which the yacht has undergone. It is not pretended, in reference to this yacht,

that she was in any respect what is called, to use a common but expressive term, "a fancy article." She was an ordinary steam yacht, with old engines, of a type such as prevailed in the year 1880, a type which has since then been enormously improved upon and cheapened. She has no remarkable qualities either as to speed or as to economy of operation. She could only make eleven or twelve knots, and her coal consumption for her speed was large. Everything goes to show that she was a boat of an exceedingly ordinary type, and whatever may have been the range of prices which different purchasers would have been willing to pay for her, it was certainly possible to determine a maximum market value. This is the only important question here; for it appears that the valuation placed upon her in this contract, and enforced by the Court, was about double the amount anyone competent to testify would have sworn was a maximum estimate of her value. The case is one of those where the damages stipulated are grossly disproportionate and excessive, and where the Court should apply equitable principles for the relief of the contracting party. Even in those cases where the Courts have been willing to regard the sum as liquidated damages, on account of the impossibility of ascertaining the actual loss, they have still insisted that the stipulated sum shall be proportionate to the presumable or probable loss. Exercising as they do the widest liberty in interpreting these contracts for stipulated forfeitures, they have looked first and foremost at the question of disproportion, and no case can be found where parties have been held bound to a stipulated sum for damages, where the sum stipulated was "disproportionate," to borrow the phrase of Judge GRAY, of the New York Court of Appeals, "to the presumable or probable damage, or to a readily ascertainable loss."

V.

THE PRESENT CASE IS CLEARLY DISTINGUISHABLE FROM THAT OF VALUED POLICIES OF INSURANCE OR OF VALUATIONS STIPULATED IN CONTRACTS BY COMMON CARRIERS.

It has been attempted by the libellant, to avoid the application of the well-settled law on the subject of penalties and liquidated damages in a contract, by reference to what are asserted to be the analogous cases of valued policies of insurance. The Court of Appeals even went so far as to say:

> "It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is, in the absence of fraud or mutual mistake, conclusive upon them."

The learned Court refers in support of this statement in its opinion to the following cases:

Providence & Stonington Steamship Co.. vs. Phœnix Ins. Co., 89 N. Y., 559.
Hart vs. Pennsylvania R. R. Co., 112 U. S., 331.
Graves vs. Lake Shore R. R. Co., 137 Mass., 33.
N. Y., N. H. & H. R. R. Co. vs. Sayles, 58 U. S. App., 18.

We submit that the bearing of the cases referred to by the learned Court of Appeals was totally misconceived, and that they have no application whatever to the case at bar. The cases referred to are cases either of valued policies of marine insurance or limited liability contracts of common carriers. Neither of these presents any analogy to the contract in the case at bar, and both of them are governed by a totally different principle.

We will examine them in detail:

I. Providence & Stonington S. S. Co. vs. Phœnix Insurance Co., *et al.*, 89 N. Y., 559:

This is a case of a valued policy of insurance. The defendant insurers had insured a vessel in various sums, amounting altogether to $75,000, and this, for the purposes of the insurance, was declared to be the value of the vessel. The vessel was wrecked, but subsequently got off by the aid of a wrecking company and repaired. The value of the repairs amounted to $46,000, which was paid by the insurers, and the expense of salvage amounted to $21,840. This last amount it was contended by the insurance companies, should be adjusted by general average between the insured and the insurers in the proportions of their respective interests, the interest of the insured being taken to be the sum of $200,000, by which the actual value of the vessel exceeded the stipulated value in the policy. The Court held that the stipulation in the policy governed, on the ground that the insured had paid the insurers for this indemnity, and that they were entitled to receive it. Says DANFORTH, J.:

> "The insurers are estopped from saying there was any value in excess of the $75,000 agreed upon, and to that extent they undertook to indemnify the owners. They now seek to divide the loss by presenting a different basis of value. If they succeed, the assured will lose the indemnity for which they paid, and the consequences of a loss would be cast upon them. Such a result is required by no adjudged case, and would be against the principles both of law and equity."

The insurers were therefore required to pay the entire ascertained loss, such loss being within the amount for which the vessel was insured.

In his opinion at the trial Judge BROWN pointed out that the present contract had no resemblance to a valued policy. He said:

> "The valuation clause in marine policies of insurance is not analogous, I think, to this charter. In such policies that clause has reference to a single object—namely, the rights of the parties upon a loss by sea peril. In this charter the object was to determine, also, the amount of security which was designed to cover and does cover a multitude of parts, as well as the important obligation to pay the charter hire."
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> Transcript, p. 358.

Judge BROWN might have added a still broader line of distinction—namely, that the contract of marine insurance is a contract where the insurer assumes certain risks, and for which he receives a certain compensation graduated upon the nature of the risks. If the insured desires to enlarge the risk of the insurer he pays therefor a higher premium. If the insured desires to limit his risk he has the right to do so in the policy, and for the assumption of such limited risk he receives accordingly a limited premium. No such conditions attach to the charter in the case at bar.

If the principles of law in reference to valued policies of marine insurance are to govern in other contracts, where the element of graduated consideration is entirely wanting, then every decision which has been cited above, where a provision for liquidated damages is held to be a penalty, is wrong, and the Courts can no more grant relief in those cases—although it has been their universal practice to do so, both in England and America, for more than a century—than they can in the case of a valued policy of insurance.

2. Hart vs. Pennsylvania R. R. Co., 112 U. S., 331:

The same distinction which has been drawn above applies to the case here cited. It is a leading case, one which has been repeatedly cited and followed during the seventeen years since it was reported. It shows the distinction between the two classes of con-

tracts, as fixed by the Supreme Court of the United States, with such clearness and force that we quote from it at length:

The case was one of a contract of carriage between a common carrier, the Pennsylvania Railroad Company, and a shipper, for the transportation of certain horses. The bill of lading stated that the horses were to be transported "upon the following terms and conditions which are admitted and accepted by me as just and reasonable, first, to pay freight thereon" at a rate specified "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding $200 each, etc."

The horses shipped were injured in transportation, and being race horses were of a much higher value than that specified in the bill of lading. The Court held that the shipper was bound by the valuation named in the bill of lading, on the ground that the compensation for the transportation was directly based upon the valuation made therein. This is the same principle which applies in the case of valued policies, and it completely distinguishes both the valued policies and the common carrier's limited-liability contracts from the contract at bar.

Mr. Justice BLATCHFORD, delivering the opinion of the Court, said:

> "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, 'a limited liability live-stock contract,' and is confined to live-stock. * * * The presumption

is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight. * * * There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss ; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assumed."

So careful was Mr. Justice BLATCHFORD that this case should not conflict at all with the principles governing ordinary cases of liquidated damages and penalties, that he repeats the principle governing his decision at the end of his opinion, as follows:

"The *distinct ground of our decision in the case at bar* is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the

negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

3. Graves vs. Lake Shore R. R. Co., 137 Mass., 33:

This case is the case of a carrier's limited liability contract, and is precisely similar to the Hart case. It was decided upon similar grounds.

The Court said that the defendant's "claim is that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value. * * * It is just and reasonable that a carrier should base his rate of compensation to some extent upon the value of the goods carried; this measures his risks and is an important element in fixing his compensation. * * * Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of carriage, including the risk of loss from the negligence of servants."

4. N. Y., N. H. & H. R. R. Co. vs. Sayles, 58 U. S. App, 18:

This case is similar to the Hart case and is decided upon that authority.

The petitioner therefore contends:

FIRST. That whether a sum designated in a contract as the amount to be paid in case of a breach is stated to be a penalty or is stated to be liquidated damages, the courts will disregard the language used and will hold it to be a penalty if the sum named is disproportionate to the actual loss.

SECOND. The evidence offered in the case at bar was sufficient to show a gross disproportion between the sum stipulated in the contract and actual loss.

THIRD. Both the trial Court and the Appellate Court expressly refused to consider this evidence and assessed the damages on the basis of the stipulated sum without reference to the evidence of actual loss by which the disproportion was proved.

FOURTH. There is no difficulty in ascertaining the value of a yacht as a subject of purchase and sale or as a manufactured product.

FIFTH. The cases relating to valued policies of marine insurance and limited liability contracts of common carriers, on the authority of which the Court of Appeals decided to adhere to the stipulated sum, have no application to the circumstances of this case.

Point II.

THE BREACH OF THE CONTRACT, ALLEGED AS THE GROUND OF RECOVERY, BEING THE FAILURE TO REDELIVER THE VESSEL, THE CASE FALLS WITHIN THE PRINCIPLE THAT, WHERE A CONTRACT HAS BEEN MADE TO DELIVER A SPECIFIC THING, AND THE THING HAS IN THE MEANTIME BEEN DESTROYED, NO OBLIGATION RESTS UPON THE CONTRACTING PARTY TO DELIVER IT OR ANSWER IN DAMAGES UNLESS THE DESTRUCTION WAS DUE TO HIS NEGLIGENCE.

Upon this question the leading case is that of *Young vs. Leary* (decided in the New York Court of Appeals in November), 1892, 135 N. Y., 569. This

was an action brought against Leary, the surety on a charter party executed by one McKay. The provisions of the charter party were similar to those in the case at bar. There was a contract on the part of the charterer to insure the vessel for the benefit of the owner during the term of the charter party, which expired in the month of October, 1885. This covenant in the contract was duly performed. It was also provided that all other losses not covered by the policy described during the term of the charter party should be paid by the charterer. When the charter party terminated in October, 1885, the parties were negotiating for the purchase and sale of the vessel. The negotiations fell through, and the vessel remained in the possession of the charterer, and was in such possession when she was destroyed by fire at sea in the following January. There was the usual stipulation for the redelivery of the vessel, which obligation, however, was one that would have devolved upon the charterer without any written contract. The question then was: Could the plaintiff recover for the failure to redeliver subsequently, after the vessel had been lost? Mr. Justice PECKHAM, in delivering the opinion of the Court, said:

> "The questions in this case arise out of a charter-party executed on the 17th of October, 1884, by the Washburn Steamboat Co., and one McKay, for whom the defendant became surety. The company on the day mentioned let and McKay hired the steam propeller called the 'Alicia A. Washburn,' of which the company was the owner, for the term of twelve months, from October 17, 1884, to be employed in lawful trade between Key West and other points on the West Florida coast on the terms and conditions mentioned in the charter-party. Among other provisions thereof was one by which McKay agreed to procure a fire and marine insurance policy for $27,000 for one year on

such boat, in the name of the company, and to pay the premium thereon as an additional consideration of the charter. McKay also agreed to pay a certain rent per month for the use of the boat, commencing on the 17th of October, 1884, and also agreed that on the termination of the charter he would '*deliver the said steam propeller to the Washburn Steamboat Company, or their legal representatives, in New York harbor, in the same good condition as she is now in, ordinary wear and tear excepted.*' Another provision in the charter-party was as follows: 'That said McKay hereby assumes all fire. marine and other risks of damage that may happen to said vessel and also assumes all liability of every kind and nature, for which said propeller or its owners may be responsible during the term of this charter, which is not covered by fire and marine insurance hereinbefore mentioned.'

"McKay procured in the name of the company a fire and marine policy of insurance upon the vessel for $27,000, for one year from October 17, 1884, and paid the premium thereon as he had agreed to do in the charter-party.

"The vessel was burned at sea in January, 1886."

135 N. Y., pp. 572, 573.

The Court further said:

"The remaining obligation of McKay under this charter-party is contained in that provision by which he agreed, in the language already quoted, to deliver the vessel to the company in New York harbor.

"It has been claimed on the part of the plaintiff in the courts below, and it is now urged here that this promise to deliver was on its face an absolute and unconditional one, and a failure to fulfill it would not be excused by the entire destruc-

tion of the vessel before breach and without fault on the part of the charterer. It is true that the vessel was not destroyed at the time when by the terms of the original promise McKay had bound himself to deliver it in New York harbor. The question is whether the contract to deliver was absolute and only to be complied with by an actual delivery within the time agreed upon, or whether a destruction of the thing hired before breach and without the fault of him who hired it would not absolve the latter from his contract. If it would, there is the further question whether the facts herein do not show a waiver of the contract to deliver at the specified date and an implied extension of the time for such delivery and the destruction of the vessel within the time thus extended without the fault of the hirer. Or at least whether the facts proved were not enough to permit a finding of the fact of such waiver and extension.

* * * * *

"We do not think that the law applicable to the class of cases of which that of *Harmony vs. Bingham (supra)* is a conspicuous example, applies here.

"The contract in this case comes, as it seems to us, under another class which relates to the hiring for use of the thing hired, and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. *Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused.* If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand, and without fault on the part of the bailee, he is excused (Williams vs. Lloyd, W.

Jones, 179; Sparrow vs. Sowgate, *Id.*, 29). Mr. S. Martin Leake, in his digest of the Law of Contracts, at page 706, says: 'The authorities establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the contract becomes impossible from the perishing of the thing without the default of the contractor' *(Idem*, pp. 575, 576, 577*)*.

* * * * * *

"When language like that found in this agreement is used, the condition of continued existence is implied, and as thus interpreted it creates nothing more of an obligation than that which the law raises without any such promise. When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it. So it was held in the case of *Ames v. Belden* (17 Barb., 513), where the defendant was sued for its value for not returning a steamboat according to the condition of the charter-party, by which defendant agreed to return the same at the expiration of the term in as good condition as it then was, excepting ordinary use and wear. The Court said the language must be held to have reference to the ordinary obligation

of such a bailee to return the article hired, and defendant was exempt if before the time arrived the article had been destroyed without his fault. This is only another way of saying that *an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and, if in the meantime it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed.* The case is thus entirely supported by the cases above cited" (pp. 577, 578).

"It seems to me as if authorities are not required upon the proposition that in a contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made, for, to again quote the language used by Mr. Justice BLACKBURN in *Taylor vs. Caldwell (supra)*: 'In the course of affairs men in making such contracts in general would, if it were brought to their minds, say that such should be the condition.' There is nothing in the other portions of the charter-party which affects in any way to the detriment of the defendant this particular question. If there had been no provision for insurance, and the vessel had been destroyed by fire before the 17th of October, 1885, and without the fault of McKay, it seems to me plain that neither he nor his surety, the defendant here, would be liable on the promise to deliver the vessel in the harbor of New York. The provision for insurance was complied with by McKay, and hence no liability attaches by reason of it" (pp. 578, 579).

In that case it appeared that Leary, the surety of Mc Kay, had insured the vessel against loss by fire in the sum of $17,000, and had collected the insurance and had retained it for his own use and benefit, and

the Court said that it might be that the plaintiff would have an action to recover from the defendant the amount of the insurance as for money had and received by the defendant to his use.

In the opinion in the case at bar delivered by Judge Wallace for the Circuit Court of Appeals the principle is stated thus:

> "A contract of hiring presupposes the continued existence of the thing hired during the term of hiring, and because the parties must have known that otherwise it could not be fulfilled and the whole contract is founded upon that understanding, the courts have conconstrued express promises for the redelivery of the thing in as good condition as when received as intended merely to stand for the implied condition, and not as intended to impose a more stringent liability upon the hirer. Such a case was *Young vs. Leary* (135 N. Y., 569). That was an action to recover of a charterer the value of a vessel which was destroyed during the charter term by fire, and was brought for the breach of a condition in the charter to deliver the vessel to the owner at its termination 'in the same good condition as she is now, ordinary wear and tear excepted.' The Court read the condition as intended to create no other obligation than would have been raised by implication without it, and said: 'When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.' Decisions to the same effect are *Ames vs. Belden* (17 Barb., 513), and *Hyland vs. Paul* (33 Barb., 241)" (*Transcript*, pp. 280, 281).

In other words, the liability under the contract was the ordinary liability of a bailee.

But the Circuit Court of Appeals having thus stated the law as enunciated in *Young vs. Leary*, goes on to say:

> "On the other hand, the Supreme Court of Massachusetts decided in an action brought to recover damages to the article hired caused by accidental injuries, where the contract contained a condition to return it 'in as good order as when received, customary wear and tear excepted,' that the bailee was not excused from performance. *Harvey vs. Murray* (136 Mass., 377)." "In *Drake v. White*, 117 Mass., 10, there was a bailment of personal property by a debtor who pledged it as collateral security for a loan to the defendants upon the express promise of the latter 'to deliver the same, or its equivalent in money,' on the payment of the loan. The court, holding the creditor not discharged by the destruction of the property by fire without his fault, based its decision upon the terms of the express contract to redeliver, and used the language: 'if, in the common case of a pledge, the common-law contract was reduced to writing it would contain, among other things, a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or other of two things—either to return the property specifically or to pay for it in money.'
>
> "The question in all cases of this kind is a question of the construction of the contract, and the defense of impossibility of performance has been sustained, not because contracts of hiring are not within the general rule, but because the terms of the particular contract were thought to withhold it from the rule *(Dexter v. Norton*, 47 N. Y., 62*)*.
>
> *Transcript*, p. 281.

Judge WALLACE then goes on to adopt the supposed

doctrine of these Massachusetts cases, thereby distinctly overruling *Young vs. Leary*, which has always been regarded since it was decided as being the settled law, and which was generally held to have overruled the few contradictory earlier cases.

The case of *Harvey vs. Murray*, 136 Mass., 377 (decided in 1884), has no application here. It was a case of hiring, where the defendant hired the plaintiff's piano, with an agreement "to return it in as good order as when received, customary wear and tear excepted." The piano was injured in a storm, and the Court rightly held that the defendant was required to make good the injury. Obviously, this has nothing to do with the question of the impossibility of performance by the destruction of the *res*.

Drake vs. White, 117 Mass., 10, also cited by Judge WALLACE, is a case where a safe was held by the defendant as collateral security for debt, and an express promise in writing was made by the defendant upon payment of the note to redeliver the safe "or its equivalent money." The safe was destroyed by fire, and the Court held that the impossibility of performing one part of the alternative promise did not relieve the defendant from the obligation to perform the other.

Neither of these cases affects the question in the case at bar.

The cases of *Warth's Executrix vs. Mack*, 51 U. S. App., 133, and *Burrill vs. Crossman*, 35 U. S. App., 608, have no application to the present case. The first was a case where the parties contemplated the event of the destruction of the thing in question and made an agreement providing for that event. The Court decided that they must be held to that agreement. The second was an action for demurrage in the unloading of a cargo at Rio at the time of the revolution. There the acts of the revolutionists were one of the reasons alleged to justify the inability of the parties to unload. The Court held that the obligation of

the charterer to have his work completed within that period, whatever circumstances occurred, was one that could not be met by the suggestion that the revolution caused delay.

The deciding principle in *Young vs. Leary*, as it must be in this case, was declared in *Taylor vs. Caldwell*, 3 Best & Smith, 826, 32 L. J. Q. B., 164.

In this case the defendants agreed to let plaintiffs have the use of the Surrey Gardens and Music Hall on certain days for the purpose of giving entertainments. Before the first of these days the Music Hall was destroyed by fire, so that the entertainments could not be given, and without fault of either party.

Held, that defendants were excused from performing their part of the contract, the Court declaring the following principle:

> "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time of fulfilling the contract arrived, some particular specific thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; then in the absence of any express or implied warranty" (that is, understood in fact between the parties; not implied in law) "that the the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contracting parties."

The principle was extended further in *Appleby vs. Myers*, L. R., 2 C. P., 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and

to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract; that there was no absolute promise or warranty by the defendant that the premises should at all events continue to exist. The Court said:

> "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither."

See, also,

Benjamin on Sales, 3 Am. Ed. Sec. 570.
Wells vs. Calnan, 107 Mass., 514.

These cases were cited and followed by the Supreme Court of the United States in "The Tornado," 108 U. S., 342. That was a libel in Admiralty against the cargo of the ship "Tornado" brought by the master and owners of that vessel, to recover freight money. The ship, while moored at a wharf in New Orleans and bound on a voyage to Liverpool, England, and before she had broken ground for the voyage, was so injured by fire that she was rendered unseaworthy and incapable of earning freight.

Her master had given bills of lading for the transportation from New Orleans to Liverpool of certain bales of cotton.

Held, that no recovery from the shipper could be had by the master and owners on the contract of affreightment, upon their offering to transport the cotton by another vessel, the Court saying:

> "We are of opinion that by the disaster, which occurred before the ship had broken ground or

commenced to earn freight, the circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. The contract had reference to a particular ship, to be in existence as a seaworthy vessel and capable of carrying a cargo and earning freight and of entering on the voyage. All the fundamental conditions forming part of the contract of the shipowner were wanting at the time when the earning of the freight could commence. * * * The shipowner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that this particular vessel was to take it on board and enter on the voyage. *Before that event occurred this vessel was substantially put out of existence by no fault of the shipper,* and he had and could have no benefit from the contract."

The Tornado, 108 U. S., pp. 349–351.

See, also,

Price vs. Pepper, 13 Bush., 42.
Dexter vs. Norton, 47 N. Y., 62.
Sch. Dist. No. 1 vs. Douchy, 25 Conn., 530.
Thomas vs Knowles, 128 Mass., 22.
Lovering vs. Coal Co., 54 Pa. St., 291.
Walker vs. Tucker, 70 Ill., 527.

The case of *Dexter vs. Norton et. al., 47 N. Y., 62*, is clearly an authority against the libellant, for the Court of Appeals held that the liability for the non-performance of a contract depends upon the continued existence of the person or thing. In that case the defendant had contracted to deliver 161 bales of cotton which subsequently were accidentally destroyed by fire. Chief Judge CHURCH, in rendering the opinion of the Court, said :

"The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract" (p. 64).

* * * * * *

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end" (Benjamin on Sales, 424). In replevin for a horse, and judgment of *retorno habendo*, the death of the horse was held a good plea in an action upon the bond (12 Wend., 589). In *Taylor vs. Caldwell*, 113 E. C. R., 824, *supra*, A agreed with B to give him the use of a music hall, on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. BLACKBURN, J., at the close of his opinion, lays down the rule as follows: "*The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance.*" And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing" (p. 65).

* * * * * *

"Upon the grounds upon which this rule is based, of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, *the condition being that the property shall continue to exist.* If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the excep-

tion, to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved" (pp. 66, 67).

In *Dolan vs. Rodgers, 149 N. Y., 489*, the Court of Appeals, in its opinion by Judge VANN, again held that the law implies a condition that the property shall continue to exist. In speaking of the English case of *Taylor vs. Caldwell*, 32 L. J., Q. B., 164, Judge VANN said:

"That case was made the basis of a judgment rendered by this Court in an action involving the sale and delivery of specified articles of personal property, under such circumstances that the title did not vest in the vendee, and it was held that, as the property was destroyed by an accident, without the fault of the vendor, so that delivery became impossible, the latter was not liable to the vendee in damages for the non-delivery, because the law implied a condition that the property should continue to exist *(Dexter v. Norton*, 47 N. Y., 62)," (pp. 492, 493).

And then he continued:

"So contracts for personal services requiring skill, which can only be performed by the person

named, are held not of absolute obligation under all circumstances, but subject to the implied condition that the person designated shall be able to perform at the time specified (Spalding vs. Rosa, 71 N. Y., 40). Judge ALLEN, in delivering the opinion of the Court in the case last cited, said: 'Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract' *(Id., p. 44)*.

"There are many cases holding that the continued existence of the means of performance, or of the subject matter to which the contract relates, is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception, and, as said in *Dexter vs. Norton (supra)*, it operates 'to carry out the intention of the parties under most circumstances, and is more just than the contrary rule'" (p. 66) *(Tone vs. Doelger*, 6 Rob., 251, 256; *Walker vs. Tucker*, 70 Ill., 527; *Thomas vs. Knowles*, 128 Mass., 22; *Field vs. Brackett*, 56 Me., 121; *Scully vs. Kirkpatrick*, 79 Pa. St., 324, 332; *Shear vs. Wright*, 60 Mich., 159; *Howell vs. Coupland*, L. R. [1 Q. B. D.], 258; *Robinson vs. Davison*, 40 L. J. Ex., 172; *Appleby vs. Myers*, 36 L. J. C. P., 331, 336*)*.

Idem, pp. 493, 494.

In *Lorillard vs. Clyde et al., 142 N. Y., 456*,

Chief Judge ANDREWS, in rendering the opinion of the Court of Appeals, said:

"But it is now well settled that *when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation.* Executory contracts for personal services; for the sale of specific chattels, or for the

use of a building, are held to fall within this principle. *(Dexter vs. Norton*, 47 N. Y., 62; *People vs. Globe Mutual Ins. Co.*, 91 *Id.*, 174; *Taylor vs. Caldwell*, 113 Eng. C. L., 826.) These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the Courts, in accordance with the manifest intention, construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrive. So, if, after a contract is made, the law interferes and makes subsequent performance impossible, the party is held to be excused *(Jones vs. Judd*, 4 N. Y., 412*)*."

Idem, p. 462.

In *Lindsey vs. Gordon*, 1 Shepley (13 Maine, 60), decided by the Supreme Judicial Court of Maine in April, 1836, and cited by Judge PECKHAM in rendering the opinion of the Court in *Young vs. Leary* (see 135 N. Y., p. 580) John Lindsey of Portland had agreed to convey the schooner "Spartan" to Thomas Gordon, on payment of three notes given for her, the first to be paid within one year, and at the same time Gordon received possession of the vessel and gave to Lindsey a writing promising to deliver to him a "load of hardwood within thirty days towards the payment of the first note," and "to keep said vessel in good order and to deliver her up to said Lindsey" on failure to pay the notes as they fell due. The wood was not delivered, and in forty days a small payment was made on the first note. Before one year had passed the schooner was lost at sea while in the possession of Gordon. Chief Justice WESTON, in rendering the opinion of the Court, said:

"By accepting a partial payment after the thirty days, we consider the plaintiff to have waived his right to the immediate return of the vessel and to have assented to the continuance of the contract, and that the vessel should still continue in the possession of the defendants. It remained then at the

> plaintiff's risk, and being lost without the fault of the defendant, redelivery by them is excused and no action lies against them therefor" (*Idem*, p. 63).

The learned counsel for the libellant seem to rely on what they allege to be a limitation of the principle which we assert, although such alleged limitation is not referred to by Judge WALLACE in his opinion, but is claimed to be found in the language of Judge PECKHAM in *Young vs. Leary*, where that learned Judge says:

> "It is otherwise if the lessee has covenanted to repair or rebuild (*McIntosh vs. Lown, supra; Phillips vs. Stevens*, 16 Mass., 238.)"
> *Young vs. Leary*, 135 N. Y., p. 578.

From an examination of these two cases and all the other cases cited by Judge PECKHAM we are able to deduce readily the following principle: Where the covenant is to "*keep in repair, support and maintain the fences and buildings*," as in *Phillips vs. Stevens*, 16 Mass. Reports, p. 238, or simply to "*keep the buildings and fences* in good repair, except natural wear and tear," as in *McIntosh vs. Lown*, 49 Barbour, page 554, the lessee is bound to rebuild in case of accidental destruction by fire or otherwise. But where the covenant of the lessee contains the qualifying words: "*To repair or keep in repair and leave the premises in the same state as he found or received them*," or language to that effect, he is NOT bound to restore buildings destroyed, by fire or otherwise, during the term, without his fault.

If we examine the agreement or charter party printed in the *Transcript* at pages 15 and 16, we find that the covenant bound the hirer, Chester S. Lord, to "keep said yacht in repair," and to "surrender said yacht * * * at the expiration of this contract in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." The

covenant reads, leaving out the immaterial part: "That the hirer will carry out the provisions of the charter party made on the first day of April last, and will, until the expiration of this contract, keep said yacht in repair, * * * and will surrender said yacht with all its gear, furniture and tackle, at the expiration of this contract, to the owner, or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description."

The qualifying words, therefore, found in our charter party, to "*surrender the yacht in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted,*" release us from any obligation to restore the yacht which was destroyed by shipwreck.

The Monroe General Term of the New York Supreme Court, in the case of *McIntosh vs. Lown*, 49 Barb., 550, in its opinion rendered by Mr. Justice WELLES, pointed out the effect of the qualifying words to which we have already alluded. The Court said:

> "Some authorities hold that where the covenant by the lessee is *to repair and leave the premises in the same state as he found or received them, or* language to that effect, he is merely required to use his best endeavors to keep them in the same tenantable repair, and is not bound, by such a covenant, to restore buildings destroyed, by fire or otherwise, during the term, without his fault. This is in consequence of a construction given to the covenant, that the lessee is *so* to repair or keep in repair the buildings, &c., *as* to leave the demised premises in the same state as he received them; and such I think is the settled law. But where the covenant is to repair or keep in repair generally, the buildings, &c., without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, &c., in case of the accidental destruction of the building, &c."
>
> *Idem*, p. 555.

The case of *Ames vs. Belden* was an action to recover the value of a steamboat and a canal boat for not returning the same according to the condition of the charter party, which contained the following covenant:

> "And it is further understood that the said Belden shall be at all the expense of manning and furnishing said boat or boats for the time above stated, and return the same to the said Ames at the port of Port Ontario *in as good condition as they now are, with the exception of the ordinary use and wear;* and if the said Belden shall at any time refuse to fulfill on his part, the said Ames shall have the right to take possession of the said boats wherever the same be found."
>
> *Ames vs. Belden*, 17 Barbour, pp. 513, 514.

And Mr. Justice HUBBARD, in rendering the opinion of the Oswego General Term, said:

> "It is contended on the part of the plaintiff, and this is the gravamen of the action, that the defendant covenanted by the terms of this clause to return the boats *at all hazards* at the expiration of the lease, and that he is not excused from performance on the ground of the casualty set up in the answer. This construction I think untenable. In my judgment, the understanding expressed is, simply, what the law would have implied, and the language should, therefore, be construed as having been used with reference to the common-law obligation of a bailee in a bailment of this kind. At common law the duty of such a bailee is to exercise that degree of diligence and care in the preservation of the subject of the trust, which a prudent man ordinarily exercises in regard to his own property *(Story on Bail.*, Sec. 399*)*. His responsibility is limited to ordinary neglect; and hence, if the thing bailed is lost or injured by inevitable accident, without his fault, he is not liable *(Id.*, Sec. 408*)*."
>
> 17 Barbour, pp. 514, 515.

* * * * *

Judge WALLACE, in rendering the opinion of the Circuit Court of Appeals in this case, says:

> "In the present case the charterer not only explicitly undertook by the contract to return the yacht at the expiration of the term of hiring in as good condition as at the beginning, 'fair wear and tear from reasonable and proper use only excepted,' but also explicitly undertook to be responsible for any loss or damage to any part of the vessel, her equipment and furniture, and also to secure the owner in a specified sum against all losses and damages which might occur to her. It is impossible to construe such a contract as contemplating that the loss of the yacht by *vis major* or inevitable accident should discharge the charterer from further liability. The case is one where the promisor must fulfill the terms of his promise or respond in damages for a breach."
>
> *Opinion of Judge Wallace, Transcript*, pp. 281, 282.

The particular clauses of the charter party thus referred to by Judge WALLACE are the following:

> "That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00), and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.
>
> * * * * * *
>
> "The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like."
>
> *Transcript*, p. 16.

We are unable to see any force in this reasoning of the learned Court. The whole contract must be read as one instrument, and the covenant to keep the

yacht in repair and surrender the yacht at the expiration of the contract expressly and explicitly limited by the qualifying words "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," is the controlling covenant as to redelivery or return of the vessel, and is conclusive as to the nature of the obligation.

The agreement of Lord to secure the owner in the sum of seventy-five thousand dollars, to secure any and all losses and damages which might occur, was merely an agreement to give a bond in which the penalty should be fixed at the sum of seventy-five thousand dollars, while the covenant that the hirer Lord should be responsible for any and all loss and damage to the hull, machinery, &c., imposed no greater liability upon the hirer than the other covenant to keep the yacht in repair and surrender the yacht at the expiration of the contract in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted.

The evidence shows that Chester S. Lord, who made and executed the charter-party or agreement in force at the time of the loss of the yacht (Exhibit B, *Transcript*, pp. 15, 16 and 71), was the managing editor of the "Sun"; he was not an officer, trustee, director or even a stockholder in The Sun Printing and Publishing Association, the corporation defendant. And the so-called charter-party and the agreement of suretyship or bond were executed by Lord without any authorization on the part of the corporation or without the sanction of any vote of its Board of Trustees or directors, but the corporation is held liable on the theory that, by the user of the vessel, it ratified the act of its agent Lord. But it cannot be reasonably supposed to have been in the contemplation of the Sun Printing and Publishing Association or of Lord to bind "The Sun" to restore the yacht in the event of her total destruction, by peril of the sea, the act of God or the *vis major*.

It is sought here to hold "The Sun," through the unfortunate act of its managing editor Lord, to a strict and rigid meaning of general words and to such a construction of the contract as would visit upon the defendant all the consequences of a breach. The construction contended for by the libellant would make the contract unreasonable, and would place one of the parties at the mercy of the other, and the law does not favor such construction.

> "Where there is uncertainty or doubt as to the meaning of words or phrases used in a contract, in seeking for the intent of the parties interested as evidenced by the words used, the fact that a construction contended for would make the contract unreasonable and place one of the parties at the mercy of the other may properly be taken into consideration (*Russell v. Allerton*, 108 N. Y., 288; *Wright v. Reusens*, 133 N. Y., 298, 305; *Jugla v. Trouttet*, 120 N. Y., 21, 28)."
>
> *Gillet vs. Bank of America*, November, 1899, 160 N. Y., pp. 557, 558.

In the case of *Russel vs. Allerton*, 108 N. Y., 288, the charter party of the steamer "Bertha" provided that the cattle fittings were to be furnished by the plaintiffs, "charterers to approve the ventilation." The defendant required plaintiffs to furnish blowers for ventilation, and on plaintiffs' refusal to furnish them, refused to load the ship.

Judge PECKHAM, in rendering the opinion of the Court of Appeals, said:

> "We do not think that the effect of the words In the charter-party, 'charterers to approve the ventilation,' was to leave the subject of the ventilation of the ship to the absolute, unreasonable and wholly arbitrary decision of the charterer. The agreement was entered into in England in July, 1878, and performance was not to be entered upon, at the earliest, until the middle of the following March, and plaintiffs were to send their ship over to Philadelphia to load. It can scarcely

be regarded as credible that the owners of the vessel would place in the hands of the charterer the right to arbitrarily and without reason refuse to approve the ventilation of the ship.

"To give the words in question the meaning attached to them by the courts below is to place the plaintiffs in a matter purely of business wholly at the mercy of others with whom they were contracting. Could the plaintiffs have intended any such result, or could the defendant have expected such action on the part of the plaintiffs?

* * * * * *

"Parties have a right, of course, to make any contract they choose, so long as it is not illegal, but when the question arises as to what meaning is to be attached to words or phrases used in a contract, if there be any uncertainty or doubt concerning the same, considerations such as are above mentioned are entirely legitimate and should not be lost sight of while endeavoring to learn the true meaning of the parties as evidenced by the terms used."

Russell et al. vs. Allerton (February, 1888), 108 N. Y., pages 292, 293.

This case of *Russell vs. Allerton* was cited with approval by the Court of Appeals in the case of *Wright vs. Revsens*, 133 N. Y., 298 (May, 1892), when that Court, in its opinion rendered by Judge O'BRIEN, said:

"To assent to the construction contended for by the defendant would make the contract unreasonable and place the plaintiff entirely at the mercy of the defendant and the architect, and such a construction should be avoided when the general scope of the instrument and the terms used by the parties fairly permit a more just and reasonable interpretation *(Russell v. Allerton*, 108 N. Y. 288*)*."

133 N. Y., pp. 304, 305.

The same view was taken by the Court of Appeals as recently as January, 1901, in the case of the *Buffalo & Lancaster Land Company* against the *Bellevue Land and Improvement Company*, 165 N. Y. 247, where the learned Court said:

"The whole contract and its purpose and object must be brought into view and the language employed by the parties understood in a reasonable way. Neither party intended to be bound to do things that were impossible. The construction for which the learned counsel for the plaintiff contends would be unreasonable, and would place the defendant at the mercy of the elements, since it is well known that the operation of railroads is frequently interrupted by storms such as are mentioned in the findings in this case.

"The accepted canons of interpretation are opposed to a construction that would visit upon the defendant all the consequences of a breach, as specified in the agreement (*Del., L. & W. R. R. Co. v. Bowns*, 58 N. Y., 573; *Russell v. Allerton*, 108 N. Y., 288; *O'Brien v. Miller*, 168 U. S., 287; *Gillet v. Bank of America*, 160 N. Y., 549; *Horgan v. Mayor, etc.*, 160 N. Y., 516)."

Idem, 165 N. Y., p. 254.

"In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object, and practically the only foundation of rules for the construction of contracts is to arrive at the intention of the parties. This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties and the objects which they had in view, and when the intent is thus ascertained, it is to be effectuated unless forbidden by law. 'Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish' (*Robertson v. O. E. Co.*, 146 N. Y., 20, 24; *Halpin v. Insurance Co. of N. A.*, 120 N. Y., 73; *Smith v. Kerr*, 108 N. Y., 31, 37; *Coleman v. Beach*, 97 N. Y., 545, 553; *Parshall v. Eggert*, 54 N. Y., 18, 23; *French v. Carhart*, 1 N. Y., 102; *Colwell v. Lawrence*, 38 N.

Y., 74; *Cotheal v. Talmage*, 9 N. Y., 554; *Booth v. Cleveland Mill Co.*, 74 N. Y., 15; Beach on Modern Law of Contracts, Sec. 702; Bishop on Contracts, Sec. 380; Lawson's Rights, Remedies and Practice, Sec. 2316)"

Gillet vs. Bank of America, 160 N. Y., pp. 555, 556.

It cannot reasonably be supposed to have been in the contemplation of the contracting party, Lord, when the contract was made to bind his employer by a foolish and preposterous agreement to the payment of an enormous sum, in the event of the loss of an old second-hand vessel.

This Court in the case of the *Chicago, Milwaukee & St. Paul Railway Co. vs. Hoyt* (October Term, 1892), reported in 149 U. S., 1, said:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Idem, pp. 14, 15.

It is respectfully submitted that the Circuit Court of Appeals erred in segregating certain provisions from the entire instrument or so-called charter party, and thus frustrating the consideration of the whole agreement. Such theory of construction was held erroneous by this Court in the case of *O'Brien vs. Miller* (Octo-

ber Term, 1897), where Mr. Justice WHITE, in rendering the opinion of the Court, said:

"There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that 'if during said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void.' But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them (*Boardman v. Reed*, 6 Pet., 328; *Canal Co. v. Hill*, 15 Wall., 94).

"This general rule of construction should especially guide a court of admiralty in interpreting a contract of bottomry and respondentia.

"In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity (per

STORY, J., in *The Virgin*, 8 Pet., 538, 550); and the same learned justice, in the case of *Pope v. Nickerson*, 3 Story, 486, said: 'A court of admiralty in cases within its civil jurisdiction acts as a court of equity, and construes instruments, as a court of equity does, with a large and liberal indulgence."

O'Brien vs. Miller, 168 U. S., pp. 296, 297, 298.

In the case of "The Virgin" (January Term, 1834) 8 Peters, 538, the second headnote reads:

"It is no objection to a bottomry bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry bond may be good in part and bad in part; and it will be upheld by courts of admiralty, as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

And in rendering the opinion of the Court, Mr. Justice STORY, said:

"It is true, that the bottomry bond was taken for a larger amount; but that furnishes no ground of objection to the bond, except for the surplus; for a bottomry bond may be good in part, and bad in part; and it will be upheld by courts of admiralty, as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. There are many authorities to this effect; but it is only necessary to cite the cases of "The Augusta," 1 Dodson's R., 283, "The Tartar" and "The Nelson," 1 Hag. Adm. R., 169, 176."

Idem, p. 550.

Another principle of law in reference to the construction of constracts is that where there is any uncertainty or ambiguity as to the meaning of an agreement, it should be resolved in favor of the party who did not prepare the contract. It appears from the testimony of the libellant, William L. Moore, that the so-called charter-party, dated May 14th, 1898, was received by Moore a few days thereafter from his agent, Thomas Manning *(Transcript, p. 213*, marginal page 280*)*. Moore, the libellant, swore that Thomas Manning was his agent and was authorized by him to sign the papers *(Transcript p. 24*, marginal p. 37*)*. Manning was a yacht broker *(Transcript, p. 98*, marginal page 129*)*.

It is evident from the language of the charter party that it was drawn by Manning as the agent of the libellant Moore, and it, therefore, should be construed in case of doubt against the libellant, because he is responsible for the language used. In the case of *Gillet vs. The Bank of America* the New York Court of Appeals said:

> "Such unusual and almost unlimited power over the property of another is not to be implied or inferred from doubtful or uncertain language.
>
> "If there is any uncertainty or ambiguity as to the meaning of the agreement, it should be resolved in favor of the plaintiff, as it was the defendant who prepared this contract. If there is any doubt as to the meaning of the terms employed, the defendant is responsible for it, as the language is wholly its own. We think the principle controlling as to the construction of insurance policies and other similar instruments is applicable to this agreement, and that it should be liberally construed in favor of the plaintiff. If the language can, without violence, be interpreted to include only such liabilities to the defendant as resulted from transactions between the plaintiff's assignors as customers and the defendant as a bank, or their liabilities which came into its hands in the ordinary course of its banking business, it

should be adopted (*Mynard v. Syracuse, Bing. & N. Y. R. R. Co.*, 71 N. Y., 180; *Nicholas v. N. Y. C. & H. R. R. R. Co.*, 89 N. Y., 370; *Rickerson v. Hartford F. Ins. Co.*, 149 N. Y., 307, 313).

"The reason of the rule that the language of an instrument is to be construed against the person who proposes it rather than against the person who is invited to accept it, is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to the strict interpretation of them rather than he who only accepts them."

Idem, pp. 554, 555.

The loss of the yacht was caused by no want of skill in navigation, by no want of competency in the Master, and from no fault on the part of the vessel.

Captain Atkinson, who was the captain of the vessel at the time she was lost, testified: "My reasons for the stranding of the boat was, in the first place, an unknown current; in the second place, the non-lighting of the lights at Matternilis Point Reef" (*Transcript*, p. 101, marginal p. 133).

* * * "The causes in my opinion were first, an unknown current; second, the non-lighting of the lighthouse; third, an imperfect chart of the coast. * * * My chart gave no instructions as to currents at all" (*Transcript*, p. 101, Marg. p. 134).

"I had been informed that the lights on the north side of Cuba had been all re-lit and were burning" (*Transcript*, p. 102, Marg. p. 134).

He further testified that "stranding would have been avoided" if the light had been burning (*Transcript*, p. 102, Marg. p. 135).

And he said: "From my knowledge and the knowledge I gained while I was there, this Matternilis Point light and the light that was called the Eastern Point light were the only two lights which were not exhibited on that night. The lamps had been destroyed by the Spaniards, and our Government, not knowing this, had not furnished lights. * * * On the night in

question I know of my own knowledge that the lamps had been destroyed by the Spanish soldiers, and had not been replaced and relighted. * * * I was shown by the police the lamps that had been destroyed."

Transcript, p. 103 (marg. page 136).

Mr. Wilbur J. Chamberlin, who was on the yacht at the time of her loss, said that the chart on board the "Kanapaha" was the last chart published before the boat left here. He said: "We got an entire new set of charts for West Indian waters. It was the last United States chart" published prior to the sailing of the boat from this port.

Transcript, page 167; Marg., page 220.

He also testified that "There ought to have been two lights. The lighthouses were there, but the lights were not. The lights were not burning that night. I was on deck. I had just left the bridge. The lighthouses were in plain sight from the vessel the next day."

Transcript, page 166, Marg., page 218.

Mr. Chamberlin further testified that the reef upon which the vessel struck was not shown on the chart which was on the vessel at the time of the accident.

Transcript, page 167; Marg., page 219.

III.

THE RESPONDENT, NOT HAVING AUTHORIZED THE EXECUTION OF THE ALLEGED CHARTER-PARTY AND AGREEMENT OF SURETYSHIP, AND NOT HAVING RATIFIED THE ALLEGED CHARTER-PARTY AND AGREEMENT OF SURETYSHIP, EXCEPT AS TO THE USER OF THE YACHT, IS NOT BOUND AS TO THEIR SPECIAL PROVISIONS BEYOND THE ORDINARY LIABILITY OF A BAILEE.

The alleged charter-party and agreement of suretyship were executed by Chester S. Lord, managing editor of the morning newspaper called "The Sun," one of the two newspapers published by the defendant corporation. He was not an officer of the respondent, not a director or trustee thereof, or even a stockholder. The alleged charter-party was in his name as the hirer, and the respondent is not referred to in any way therein except in the words "For Sun Printing and Publishing Association," following the signature. The so-called agreement of suretyship is signed in the same way, although it purports in the body of the document to be an agreement made by "The Sun Printing and Publishing Company" (*Transcript*, pp. 16, 17; marg. pp. 25, 26). The evidence in the case shows an entire absence of either a general or a special authority on the part of Mr. Lord to bind The Sun Association by either of these specific contracts, nor was there anything in his occupation which would lead to an inference that he was clothed with such authority. The evidence also shows that the Board of Trustees never took any action upon these agreements of Mr. Lord, and that, as individuals, they were not aware of their contents. There could, of course, be no ratification without knowledge.

The Sun Printing and Publishing Association never authorized Mr. Lord to make the charter party or the

agreement of the suretyship, and he had no original or precedent authority to execute the contracts.

The very inartificial form of the charter party made on May 14th, 1898, and in force at the time of the loss of the yacht, shows that it was not a corporate act or an act authorized by the respondent corporation.

The Charter Party begins:

> "MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore, of the City of New York, by Thomas Manning, his Agent, party of the first part, hereinafter called the Owner, and Chester S. Lord, of the City of New York, party of the second part, hereinafter called the Hirer."
>
> *Transcript*, p. 15, marginal page 23.

And it should be noted that while it is here expressly stated that Thomas Manning is the agent of the owner, William L. Moore, it is not stated that Chester S. Lord is the agent of any party, but the paper on its face assumes to be made between Moore, through his agent Manning, and Chester S. Lord, individually. We read through the whole of the instrument without finding any words or any language to indicate that the ageerment or contract is made or purports to be made for the respondent, and it is sought to hold the respondent merely by virtue of the words "For Sun Printing and Publishing Association" following the signature of Chester S. Lord.

The so-called agreement of suretyship of May 14th, 1898, added nothing to the charter party of that date.

The charter was not acknowledged, but the execution of the agreement of suretyship was acknowledged by Mr. Lord as managing editor of The Sun Printing and Publishing Company (a palpable misnomer). The certificate of the notary states "before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of The Sun Printing

and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said company as its act and deed" (*Transcript*, p. 17, marginal page 26).

Both papers bear evidence on their faces of having been hastily executed by Mr. Lord without any due consideration of the terms thereof. Mr. Lord had no more right to make and execute these papers than he would have had to convey the real estate of the respondent corporation or the premises then and now occupied for the printing of the respondent's newspapers.

Mr. MACDANIEL, the cashier of the respondent corporation and its recording secretary, testified:

> "Q. What is the practice of the corporation of signing written instruments in behalf of the corporation? A. A resolution is passed authorizing the president or other proper officer to sign and the secretary to affix the official seal to the instrument."
>
> *Transcript*, p. 137, marginal page 181.

Mr. Macdaniel produced the minutes of the Board of Trustees of The Sun Printing and Publishing Association, and he was examined *in extenso* as to what was shown in these minutes (*Transcript, pp. 137 to 142; marginal pages 180 to 188*).

The minutes of the meeting of April 24th, 1898, were admitted in evidence.

Respondent's Exhibit B.—April 24, 1899.

> 170 Nassau Street,
> NEW YORK, April 26, 1898.
>
> The regular meeting of the Board of Trustees was held this day at 1 P. M.
>
> Present—Paul Dana, Thos. Hitchcock and Franklin Bartlett.
>
> Minutes of meeting held March 22d, 1898, were read and approved.

The Examining Committee reported the books correct to the 23d inst., and recommended a dividend of five per cent. on the capital stock, payable June 1st, 1898, which on motion was so declared.

Mr. Hitchcock was appointed to investigate and report on the subject of the investment of surplus earnings.

Application was received from the Third Avenue R. R. Co. for permission to change their motive power, and on motion of Mr. Hitchcock it was

Resolved, That said application be hereby granted, and the president be authorized to sign same and affix the corporate seal of this association to said instrument.

On motion the meeting adjourned.

Attest:

L. O. MACDANIEL,

Recording Secretary.

Transcript, p. 262, marginal page 348.

It appeared affirmatively that the Board of Trustees of the respondent corporation never authorized the execution of the charter parties or the agreement of suretyship. But the respondent, in its evidence, went a step further, and showed affirmatively that the secretary of the corporation, Mr. Thomas Hitchcock, whose duty it would have been to sign any corporate paper or any paper to be made or executed by the corporation, explicitly refused to execute these very papers.

Transcript, pp. 155, 156; Marginal pages 204, 205.

Mr. Hitchcolk also testified;

Q. Throughout the year 1898 you were one of the trustees of The Sun Printing and Publishing Association? A. I was.

Q. And I believe you attended every meeting of such Board of Trustees? A. I did.

Q. At any meeting of the said Board of Trustees or of the directors of the Sun Printing and Publishing Association was any resolution or motion passed authorizing the execution of any

charter party of this yacht "Kanapaha," or of any agreement of suretyship in reference thereto?

Objected to on the ground that the question has been already answered, and on the further ground that it is incompetent, and that any action of the Board is not binding on the libellant.

Objection overruled. Libellant excepts.

A. There never was.

BY THE COURT:

Q. Was the subject ever brought up in discussion at any meeting of the Board.

Libellant excepts.

A. It never was.

Transcript, pages 156, 157; marginal pages 206, 207,

The trustees or directors of The Sun Printing and Publishing Association, at the time of the execution of these papers in May, 1898, were Paul Dana (the president), Thomas Hitchcock (the secretary), William M. Laffan and Franklin Bartlett *(Transcript*, p. 138, marginal p. 183*)*, and at the time of the trial of this action Mr. Laffan had sailed for Europe *(Transcript*, p. 22, marginal p. 302*)*.

We have just examined the testimony of Mr. Hitchcock. Mr. Paul Dana swears that he was not consulted, and that he did not tell Mr. Lord, at any time, that he could make or execute any charter party for the respondent corporation—The Sun Printing and Publishing Association—and that he did not give any instructions to Mr. Lord on the subject of charter parties or bonds *(Transcript*, p. 229, marg. p. 302*)*.

Mr. Bartlett testified as follows:

"I am one of the trustees for The Sun Printing and Publishing Association, the respondent corporation, and was such trustee for the year 1898. I never knew anything about these alleged charter parties or alleged agreements of suretyship, and never heard anything about them until after the wreck of the vessel. The papers were never sub-

mitted to me, although contracts in writing on behalf of the corporation have often been submitted to me for years past."

Transcript, p. 248, marginal p. 325.

Judge BROWN, in his opinion, in speaking of the charters, says:

"Many circumstances, however, are brought out in the evidence in regard to the conduct of the parties during the charter period, as well as before, from which no doubt is left in my mind that these contracts must be deemed legally to be the contracts of 'The Sun,' the defendant; that Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts; that he intended to bind the defendant and not himself, and that the trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht, and such perfect means of knowledge of all the particulars, had they desired to know them, as to make their acts in using the yacht under the charters, as they did, a ratification of Mr. Lord's action, and to bind them for the performance of his agreements made in their behalf."

Transcript, pp. 264, 265; marginal pages 352, 353.

It will be seen that Judge BROWN held that "Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts," but we submit that there is no evidence upon which such authority can be predicated.

The principles which are opposed to this decision are so familiar that it is hardly necessary to cite authorities for them.

In every case where it has been held that the person exercising the power had general authority so to do, the power has been exercised by the president, the

secretary or the treasurer or by some officer of the corporation, or by the Board of Directors or by the cashier of a bank or the general manager of a business corporation, or by an authorized committee. There has been no case which has come within our notice where it has been held that an editor, not an officer or not a director of a corporation, could bind the corporation by the execution of a written contract.

> "Although judicial opinion on the question is not unanimous, the prevailing American doctrine, founded upon considerations of the most obvious sense, justice, and business convenience, is that certain powers, usually exercised by certain officers of business corporations, are presumed to exist in them, and that the public, in dealing with such corporations, have the right to act upon this presumption until the contrary fact is disclosed. Such powers are said to exist in particular officers by implication of law. The officers to whom this implication extends are those officers whose offices exist in most private corporations organized for pecuniary gain, such as the president, the secretary; in banking corporations the cashier; and in most mining, manufacturing, and trading corporations, the general manager."
>
> *Thompson on Corporations*, Vol. 4, Section 4677.

The Court of Appeals in the case of *Mechanics' Bank vs. New York and New Haven R. R. Co.*, 13 N. Y., p. 632, said:

> "Underlying the whole subject *there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent.* This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to

the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But, in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other."

It does not matter what authority Mr. Lord supposed he possessed, nor does it matter what authority he asserted that he possessed, for an agent cannot create for himself an authority simply by asserting that he has it.

"It is a general principle in the law of agency, founded upon the most obvious considerations of sense and justice, that an agent cannot create for himself an authority, simply by asserting that he has it. The contrary rule would place it in the power of any person to make himself the agent of another, simply by asserting that he has been so appointed by that other. This principle applies to the case of corporations, which, from their very nature, can only act through agents. As such agents neither appoint themselves nor prescribe the limits of their own authority, the fact that a person not being the officer or agent of a corporation claims to be such, or being such officer or agent claims to possess power which has not been conferred upon him, will not, subject to the exceptions elsewhere noted, bind the corporation." * * *

Thompson on Corporations, Vol. 4, Section 4880.

"But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts:

"1. That the act was done in the exercise; and,

"2. Within the limits of the powers delegated."
Mechanics' Bank of Alexandria vs. The Bank of Columbia, 5 Wheaton, 337.

"One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority."
Alexander et al. vs. Cauldwell et al., 83 N. Y., 480.

"It would seem to be the general rule that no acts of an agent can be resorted to to establish a power not included within the terms of his commission, except those which are brought to the knowledge of his principals and are approved or acquiesced in by them."
Bickford vs. Menier et al., 107 N. Y., 493.

"While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent.

"That is, he is bound equally by the authority he actually gives, and by that which, by his acts, he appears to give.

"For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. *The fundamental proposition is that one man can be bound only by the authorized acts of another.* He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."
Edwards et al. vs. Dooley et al. (June, 1890), 120 N. Y., p. 551.

The form of the instruments is enough to show to any one with the slightest experience in such matters that they were not done in pursuance of a formal exercise of a corporate authority. They were alone sufficient to put the other party upon notice.

> "The principle under consideration does not extend so far as to allow the authority of an agent to do a particular act to be proved by proof of his having previously done *a few similar isolated acts*, the doing of which has been tolerated by the corporation; but there must have been such a uniform course of conduct, in the face of those entitled to oppose, as would justify a man of reasonable prudence in concluding that there had been an antecedent authorization."
>
> 4 Thompson on Corporations, Sec. 4886.

The above proposition disposes of the suggestion that because a vessel had been hired by Lord on one or two previous occasions his authority to execute these instruments could have been inferred.

The essential point here is that Lord was not an officer of the corporation, and was not authorized in any way to bind it.

The respondent corporation never ratified the charter party or the agreement of suretyship executed by Mr. Lord.

No contract can be ratified by a corporation or by the officers or directors of a corporation, unless the provisions of the contract in question are known to the persons alleged to have ratified its terms. *Ratification, in other words, presumes knowledge, and, where the officers and directors are ignorant of the terms of a charter or contract, there can be no presumption that they have ratified or have intended to ratify the contract in issue.*

There can be no ratification of the acts of an agent without full knowledge on the part of his principal of all

the facts, and there must always be, moreover, an intention on the part of the principal to ratify the unauthorized act of the agent. In this case there was never any knowledge of the terms of the charter party, or even of its existence, by the corporation or its officers, until after the loss of the yacht. There was no knowledge of the penalty fixed in the bond or of the valuation of the boat at $75,000, for, as to this matter, and all the other terms of the charter party, the officers of the corporation were in absolute ignorance. There was, therefore, no intention on the part of the corporation, as principal, to ratify the terms of the charter party. It was held by the New York Court of Appeals in a recent case decided April, 1898 (*Merritt vs. Bissell*, 155 N. Y., 396), that—

> "A ratification of the unauthorized act of an agent, or of a stranger who claims to act as such, if it exists, must be found in the *intention* of the principal, either express or implied. If that intention cannot be shown, no ratification can be held to have been established. While it is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge, or otherwise, in some cases, he makes the act his own, still, where one who has assumed to act as an agent for another has no authority to do so, but is a mere volunteer, a failure to disavow his acts will not amount to a ratification, unless under such circumstances as indicate an intention to do so" (pp. 400, 401).

This case in the Court of Appeals, *Merritt vs. Bissell*, is important, for the Court of Appeals there decided unanimously that a payment of $500 by the defendant to the plaintiffs on a contract did not constitute a ratification of the unauthorized contract, and the Court of Appeals reversed the unanimous judgment of the Appellate Division of the Third De-

partment (reported 84 Hun, 194), where the opinion had been rendered by MAYHAM, *P. J.*, and had been concurred in by Justices PUTNAM and HERRICK. And this case would seem to be a sufficient answer to the theory of the libellant that the payment of $10,000 for the user of the yacht was a ratification of the terms of the charter party.

It appears affirmatively in the case that, until the yacht was lost, the directors or trustees of the "Sun," either as a board or as individuals, knew nothing about the papers in issue or the terms of the charter party or agreement of suretyship, and, where there is absolute ignorance, there can be neither ratification nor acquiescence.

Judge Thompson says in his Book on Corporations at Section 5298:

> "It is a well-settled principle in the law of *agency* that a principal may ratify the unauthorized acts of his agent by *acquiescence*, or even by *silence*, after being *fully informed* of the facts and circumstances attending the unauthorized act" *(Story on Agency*, Sec. 255; *Wharton on Agency*, Sec. 86; *Courcier vs. Ritter*, 3 Wash. [U. S.], 549*)*.
>
> "*Ratification presumes the existence of knowledge of all the facts, and the Court could well say, from all that appeared, that he was not informed of the whole transaction, and consequently was in no position to ratify the wife's act*" (Kelly vs. Geer, 101 N. Y., 664).
>
> *Hommel vs. Meserole*, Second Department, May Term, 1897, 18 Appellate Div. (N. Y.), pp. 109, 110.

Even in the case of a contract made by a vice-President and general manager, the Court will not uphold it where there is an absence of authority and an absence of ratification. Such were the facts in the case of *Camacho vs. Hamilton Bank Note Co.*,

decided by the Appellate Division of the First Department (New York). Judge PATTERSON says:

> "But it is claimed by the plaintiff that in making his arrangement with Gray he was entitled to rely upon the apparent authority which he exercised as general manager, and upon the assumption that, as general manager, it was within his province to make this contract of employment. In the absence of proof of what exact authority belongs to a person descriptively styled a general manager, there is no rule by which a court can be guided in determining what the powers of such an official really are, except such as the evidence in a particular case may furnish of what the person has done in the general course of the business of the corporation. That the words 'general manager' would import that the person bearing that title is a general executive officer for all the ordinary business of the corporation is all that may properly be inferred, and this would justify, in connection with proof of acts done, a conclusion that all ordinary contracts made by such an official are authorized by the corporation. But no presumption of law can be indulged that, because a person acts as such a manager, he has the power to bind his principal *to contracts of an extraordinary nature* and of such a character as would involve the corporation *in enormous obligations and for long periods of time.* If a general manager, simply by virtue of his being charged with the ordinary conduct of the business, would have the right to bind his principal to a contract for service for three years, involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods and thus assume to himself a power which it can-

not be supposed was ever intended to be lodged in him?

* * * * * *

"But here we find that the evidence completely fails to establish the ratification. Certainly it is not to be deduced from any relation to the subject of Mr. Seebeck, who was president of the company at the time the letters were written. The plaintiff testifies that Mr. Seebeck was in and out and saw him rendering services. *The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing.* Nor is it a ratification of *any terms or conditions* of any employment which might have been made without due authority (Harrington v. Bank, I. T. & C., 361).

* * * * * *

"We are of opinion that, upon the whole case, the court was right in rejecting the evidence of the two letters alleged to have constituted the contract, and upon these grounds:

"First. That it is not to be inferred as matter of law that an agent who was a mere general manager of a business, by which term is meant one charged with the executive administration of the current business of the corporation, has the authority to bind his principal to any contract to run for a series of years, in the absence of proof of authority to make such a contract.

"Second. That, while such authority may be inferred from evidence of acts of the general manager, known to and acquiesced in by the officers of the corporation, yet the proof in this case is wanting in that element, and there is no proof of such acts as would have justified the plaintiff in relying upon an apparent authority to make the contract on which this action is brought.

"THIRD. *That there is no proof of ratification with knowledge of the contract.*

"The plaintiff having sued on the contract, and not upon a *quantum meruit*, and the effect of a judgment in his favor being to make a binding adjudication entitling him to recover for subsequent breaches, the judgment must be affirmed with costs."

VAN BRUNT, P. J., WILLIAMS, O'BRIEN and INGRAHAM, JJ., concurred.

Camacho vs. Hamilton Bank Note and Eng. Co., 2 Appellate Division Rep., N. Y., pp. 371-374.

In *United States against Beebe*, 180 U. S., 343, two actions brought by the United States in the Circuit Court for the Middle District of Alabama against Beebe and Henshaw, respectively, as sureties upon a bond of a Collector of Internal Revenue, had been compromised by the District Attorney. Several years later the United States brought a bill against the representatives of Beebe and Henshaw to recover the amount of the bond, or so much thereof as might be possible, out of certain property of the defendants. The bill set forth the previous compromise, the fact that judgment had been entered by consent, and that one of the defendants had actually paid the judgment to the United States. The case came up on demurrer, and the judgments of the Courts below sustaining the demurrers were reversed by this Court, it being held that the District Attorney had no authority to make the compromise, and that the act of the Government attorney was never ratified by reason of the fact that his principal had not full knowledge of the facts. The Court says:

"Where an agent has acted without authority, and it is claimed that the principal has thereafter ratified his act, such ratification can only be based

upon *a full knowledge of all the facts* upon which the unauthorized action was taken. This is as true in the case of the Government as in that of an individual. Knowledge is necessary in any event (citing Story on Agency). If there be want of it, *though such want arises from the neglect of the principal*, no ratification can be based upon any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them."

United States against Beebe, 180 U. S., 343, at p. 354.

"It has been declared by this Court that 'no doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent, previously unauthorized, must, in order to bind the principal, be with full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud.'"

Bennecke vs. Insurance Co., 105 U. S., 355.
Owings vs. Hull, 9 Pet., 607.

In the Compania Bilbaina vs. Spanish-American, &c., Co., 146 U. S., 483, the Court said of a certain charter party:

"If there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses. * * * Nor did the delivery of the vessel to the respondent, and her acceptance by the latter, constitute a hiring of her under the charter party, as it would stand with the disputed clauses omitted."

The Court cited:

Eliason vs. Henshaw, 4 Wheaton, 225.
Insurance Company vs. Young's Administrator, 23 Wall., 85.
Tulley vs. County of Cook, 103 U. S., 155.
Minneapolis & St. L. Ry. Co. vs. Columbus Rolling Mill, 119 U. S., 149.

The fact that the corporation had the use of the yacht and paid for such use the sum of $10,000, and that its officers did one or two minor acts in reference to the vessel, indicates a ratification only so far as it regards the mere hiring at a specific rate. The absence of all knowledge or ratification of the particular terms and conditions of these extraordinary agreements absolved the corporation from liability under them. Its liability then becomes that of an ordinary case of bailment, where the bailee, having hired the article in question, is under a liability established by the law to redeliver the article, assuming that the article is still in existence; or, at most, if the article has been lost or destroyed through the negligence of the bailee, to answer in damages for the value of the article destroyed. It is not necessary that such a contract of hiring should be written, and the rights and duties that flow from it are matters of easy determination in law.

This ordinary contract, express or implied, for the user of the yacht may, perhaps, be said to have been ratified by the action of the association in keeping the vessel in service, paying her hire, &c. To suppose, however, that this includes such extraordinary provisions as are to be found specifically in the present alleged contract, as, for instance, that which affixes a value to the vessel at more than double their actual value; that which furnishes a guarantee or security of $75,000 to secure any and all losses and damages sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms and conditions of the contract; that which prescribes a demurrage of $500 a day for each and every day's detention after the alleged charter-party had expired—all these are stipulations quite outside the provisions of the ordinary contract of bailment, and the surety cannot be held responsible therefor in the absence of its knowledge, of any authority

on the part of the agent or of any knowledge or ratification on the part of the trustees. The existence of such unauthorized and unratified covenants vitiates the whole contract, and sets the parties back to the remedy of a *quantum valebat* under an ordinary implied contract of bailment, by which the stipulated rent would require to be paid and the property be redelivered at the expiration of the term.

Assuming that this is a case of such an implied contract, nothing could be predicated on the use of the yacht or payment of the charter money in respect of ratification except that the general terms of the implied contract of bailment were ratified; and, as Judge PATTERSON says, in the case last cited:

> "The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing. Nor is it a ratification of any terms or conditions of any employment which might have been made without due authority."

Point IV.

ASSUMING THAT THE RESPONDENT WAS LIABLE FOR THE LOSS OF THE YACHT, AND THAT ITS LIABILITY WAS TO BE COMPUTED ON THE BASIS OF THE SUM NAMED IN THE ALLEGED CHARTER PARTY, THE LIABILITY SHOULD STILL HAVE BEEN REDUCED BY THE SUM ALREADY PAID FOR THE HIRE OF THE YACHT—NAMELY, $10,000.

Such was the opinion of Judge BROWN in the trial Court, which was overruled by the Appellate Court.

The principle here involved is the simple and familiar one that where a surety has given a bond conditioned on the non-performance of certain agreements, and limiting his liability to a specific sum, any payment of the surety to the obligee on account of the

provisions of the agreement discharges to that extent his liability on the bond, and recovery must be limited to the extreme amount named in the bond, less the amount which has been already paid on account of this liability. In regard to this question three principles are to be noticed:

(1) The last clause of the contract of suretyship limits the total liability of "The Sun" to the sum of $75,000. It reads:

> "That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars."

Reading the two instruments either together or separately, it is apparent that the meaning of this clause is that "The Sun," in fulfillment of this alleged charter party and agreement of suretyship should not be called upon to pay more than $75,000 as an outside limit.

(2) There is nowhere to be found in either instrument any specific promise to pay the sum of $75,000 in case of the loss or non-return of the vessel. In order to assume any such promise or covenant, it must be read bodily into the contract.

(3) The agreement of suretyship was to cover not only losses and damages which might occur to the boat or its belongings, but also the breach of any of the terms or conditions of the contract. The agreement of suretyship, therefore, secured not only numerous minor covenants of the charter party, but also the covenant to pay the rental of the yacht—namely, $10,000.

It follows that the payment of the rental of $10,000 is one of the payments covered by and included in the aggregate maximum liability of the "Sun;" that the covenant to pay the rental was executory, as the amount was paid after the signing of the agreements, and that, consequently, the "Sun" is entitled to have

a deduction to that extent from its total liability. The reasoning of Judge BROWN upon this question, which will be found in the transcript, page 266, marginal page 355, seems to us to be unanswerable, and the question of law involved is of such importance that it should be passed on by the highest authority.

Says Judge BROWN:

> "And the security required to be given by the terms of the charter and by the agreement of suretyship, which was, in fact, given and delivered at the same time the charter was signed, includes, therefore, the payment of the charter hire as well as the performance of the many other obligations contained in the charter. The charter hire of $10,000, as the evidence shows, was paid by 'The Sun's' check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16th. So much of its obligation of $17,000 has, therefore, been discharged by 'The Sun' and the express provision of the second instrument, called the agreement of suretyship, is that in no case shall the liability of 'The Sun' exceed the sum of $75,000."

In conclusion, then, the matters of law upon which it is contended by the petitioner that the Court erred, are as follows:

1. Where a sum is named in a contract of suretyship as liquidated damages, even though expressly so named, the Court will not regard it as anything more than a penalty, when the amount specified is disproportionate to the presumable or probable loss.

This principle, asserted with great clearness and emphasis by the Circuit Court of Appeals in the Fourth Circuit and affirmed on an argument for a rehearing, with the concurrence altogether of five Judges, including the Chief-Justice, asserted likewise repeatedly

by the Court of Appeals of the State of New York, is absolutely rejected and reversed by the decision in the case at bar, which not only disregarded the general principle, but, by affirming the judgment of the trial Court, rejected from consideration all evidence as to probable, presumable or actual loss.

2. The virtual adoption of the doctrine that, as a matter of law, the value of a specific yacht is of so uncertain a character as to be incapable of measurement by pecuniary standards.

3. The proposition that, assuming that, $75,000 was to be taken as the value of the yacht, the payment made by the respondent association of $10,000 should not be applied, as directed by the trial Court, as a payment *pro tanto* of its maximum liability of $75,000, and the decision that the sum of $75,000 must be paid in addition to the $10,000 called for by the covenants in the contract, making a total payment on account of this yacht of the sum of $85,000, with costs.

4. The setting up of the principle that where a contract in writing has been made by an unauthorized agent, without knowledge of his principals in respect to its details, and without ratification, the contracting party is as much bound by all the onerous provisions of such a contract as if he had entered into it with full knowledge or had expressly ratified it; when, in point of law, it is clear that the only ratification which the corporation had made was a ratification of the general contract of hiring, or the contract for the user of the yacht. In fact, the only thing which could be presumed to have been ratified by the respondent corporation was the implied contract of bailment.

5. The attempt to reverse Young vs. Leary and other high authorities by holding that the destruction of the thing to be redelivered did not absolve the bailee,

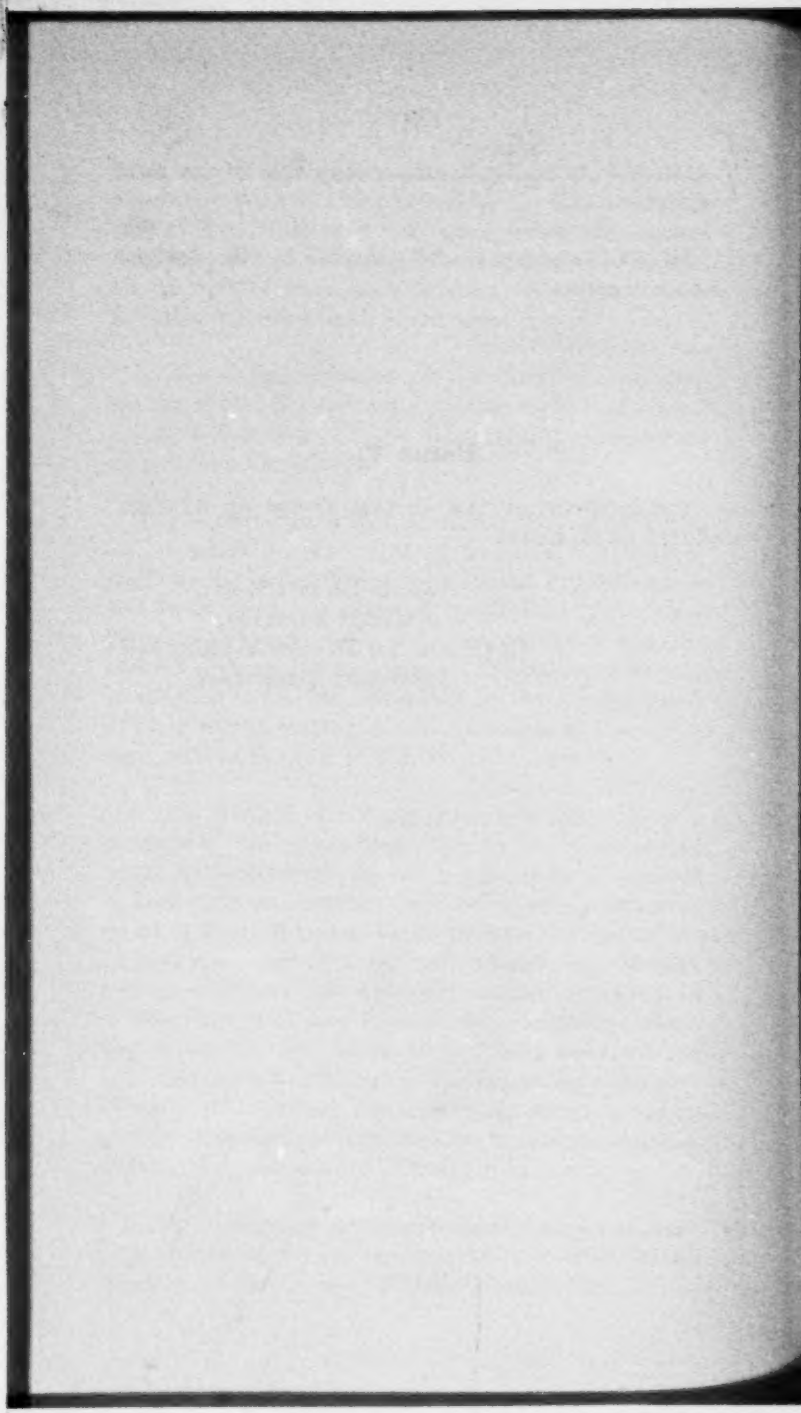
unless the destruction was in consequence of its own negligence.

All of these points are fully covered by the assignments of errors.

Point V.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

JAMES RUSSELL SOLEY,
FRANKLIN BARTLETT,
Of Counsel for The Sun Printing and Publishing Association.



No. 618. 1900. 49
Brf. of Libellant for Respondent
Filed April 30, 1900.

Supreme Court
FILED
APR 30 1900
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

WILLIAM L. MOORE, Libellant, AGAINST THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent.	618

Brief for Libellant on Motion for Writ of Certiorari.

The libellant sued the respondent in admiralty in the District Court of the United States for the Southern District of New York to recover damages for breach of a charter party made May 14, 1898, whereby the respondent, the owner and publisher of the New York *Sun*, hired the libellant's steam yacht *Kanapaha* for four months from June 1 to October 1, for $10,000, and, among other things, stipulated as follows :

(a) that the hirer " will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract, to the owner, or his agent, at Manning's Basin, foot 26th Street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear

from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description ; "

(b) that " the hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like ; "

(c) that " the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair ; "

(d). " that for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars, and the said hirer shall procure security or guaranty to and for the Owner in the sum of seventy-five thousand dollars to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the Owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract."

Charter Party, fol. 91.

The agreement of guaranty was executed not by a third person, but by the hirer, and provided :

(a). " that the hirer will well and faithfully perform and fulfil everything in and by the said annexed agreement on his part to be kept and performed ; "

(b). " that we expressly waive and dispense with notice of any demands, suit or action at law against the hirer, and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us

primarily liable under the terms of the annexed agreement;"

(c). "that our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars."
Guaranty, fol. 98.

Both the charter party and the guaranty were executed by Chester S. Lord, the Managing Editor of the respondent.

At the time the charter was made the yacht was in the possession of the respondent, and was then being used, and thereafter, until she was wrecked, continued to be used in the respondent's business for the purpose of collecting and transmitting news of the Cuban War. She was at all times under the control of a reporter of the *Sun*; her captain and crew were employed, and all her expenses were paid, by the *Sun*.

September 5, 1898, before the expiration of the charter time, the yacht was wrecked on a reef on the north coast of Cuba near the entrance to Nuevitas Harbor. The evidence in the record tends to show that the wreck was attributable to negligence of the master. The libel was amended by charging that the wreck was due to respondent's negligence (fol. 129).

The District Court gave judgment for the libellant for $65,000 and interest, and refused to give the libellant the whole value of the yacht as fixed by the charter party, on the ground that the $10,000 paid him when the charter was made as her hire for four months should be deducted from the $75,000, to which the charterer's liability in respect of breach of covenants in the charter party is expressed in the guaranty to be limited (Decree of District Court, fol. 1430; Opinion of Brown, D. J. fol. 1393).

Both parties appealed to the Circuit Court of Appeals for the Second Circuit, where the judgment was modified by awarding to the libellant the full value of the yacht as fixed in the charter party, without the

deduction made by the District Court, and in other respects was affirmed.

In the Courts below only three questions have been raised by the respondent, apart from certain exceptions to rulings upon matters of evidence taken on the trial, which, in the Circuit Court of Appeals, were not insisted upon, and are obviously of no moment except in so far as they may be involved in the main questions in the case. The respondent's contention was: (1) that respondent is not liable at all under the charter party, because Lord, who executed it, had not authority; (2) that there was no breach of the covenants of the charter party, because the yacht was destroyed by unavoidable accident; and (3) that the measure of damages, being the value of the yacht, was not fixed by the charter party, but ought to have been ascertained by evidence of what the yacht was actually worth at the time and place of her loss.

POINTS.

First. This Court has defined, with sufficient precision to exclude the present application, the nature of the questions upon which it will grant its writ of *certiorari* to review judgments of the Circuit Courts of Appeal otherwise final.

In *American Construction Company vs. Jacksonville Railway* 148 U. S., 372, this Court, speaking of the Act of March 3rd, 1891 (26 Statutes, 826), said: "The act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals and making the judgments of that court final, except in extraordinary cases" (p.

382) * * * "In the same spirit the authority conferred on this Court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require by *certiorari*, or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court', has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". (pp. 382–3)

In its latest expressions upon this point, the Court has adhered to the rule above laid down and has made it plainer.

In *Forsyth vs. Hammond*, 166 U. S., 506, the Court said: "While this division of appellate power was the means adopted to reduce the accumulation of business in this Court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision. As the courts of appeal would often be constituted of two circuit judges and one district judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the circuit courts of appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation" (p. 512). * * * "Obviously a power so broad and comprehensive if carelessly exercised might defeat the very thought and

purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice..

"So it has been that this Court, while not doubting its power, has been chary of action in respect to *certioraris*. It has said, 'It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final to be certified, can be properly invoked.'" (citing authorities—pp 513–14). * * * "While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise" (pp. 514, 515).

The principles laid down in the cases above cited were followed by this Court in *Mercantile Trust Company vs Farmers Loan and Trust Company, Trustee*, reported without opinion in 168 U. S. 710. In that case, beside a question of fact, the main question involved was the contention of the Receivers of the St. Louis and San Francisco Railway that the holders of the bonds under a branch line mortgage, upon a proper construction of the lease which bound the branch line to the main system and a general mortgage afterwards made which covered the whole system of

St. Louis and San Francisco Railways, were not entitled to be paid interest on the bonds out of the earnings of the whole system when it appeared that the branch line had not fully earned its operating expenses. The Receivers' contention was overruled by the Circuit Court (71 Fed. R. 601), and by the Circuit Court of Appeals (81 Fed. R. 254), and they were directed to pay the interest on the branch line bonds. Applying the principles of the cases cited above, and considering that the case was of no general or public interest and turned entirely upon the construction of private documents, this Court refused to grant a writ of *certiorari*.

So, the case at bar turns upon the construction of a charter party of a yacht, of no general importance.

Second. The case at bar does not present any question of general importance, nor any conflict in decision between two or more courts of appeal, or between courts of appeal and the courts of a State, nor any matter affecting the interests of the nation in its internal or external relations, nor any other question of public importance.

It involves, in short, nothing but a question of fact and two questions of law.

I. The question of fact is whether the charterer of the *Kanapaha* was the Sun Printing and Publishing Association or Chester S. Lord, its Managing Agent. The District Court held the Association to be the charterer; and the Court of Appeals, without hesitation, adopted the same view.

In this situation of the case, it is settled in this Court that successive and concurrent decisions of two courts in the same case upon a mere question of fact are not to be reversed unless clearly shown to be erroneous. This rule, which is said to be more often

invoked in admiralty cases, is yet equally applicable to appeals in equity.

Towson vs Moore 173 U. S. 17-24

The record contains abundant evidence to justify the conclusion of the courts below. Without attempting to refer to it in detail, or to all the circumstances upon which the conclusion is based, some controlling facts are undisputed.

1. The first charter of the yacht April 1, 1898, was made by Lord, just as the charter in suit was, and under that charter the *Sun* was in possession of the yacht when the charter in suit was made (Charter of April 1, 1898, fol. 83; Test. Anderson, fols. 406-7, 410-412, 416-420; Packard, fol. 948; Peterson, fols. 185-197).

2. The charter money was paid by checks of the *Sun*, the first for $5,000, dated April 2nd, signed W. M. Laffan, Manager, per L. O. Macdaniel (Exhibit 6, fol. 245); and the second, under the charter in suit, for $10,000, dated May 14th signed by Thomas Hitchcock, Secretary, and W. M. Laffan, Manager, (Exhibit 7, fol. 249).

3. The use of the yacht by respondent is admitted in the answer (fols. 63, 70, 113).

4. Payment of the running expenses of the yacht under the charter in suit by the respondent was admitted on the trial (fol. 316). Many details of the payment of expenses of the yacht, crew and reporters by the respondent are exhibited by the record (Test. Anderson, fols. 425-430; Chamberlin, fols. 846-856; Packard, fols. 957-960; Atkinson, fols. 605-624). All these expenses were entered in respondent's books. Among others, the payment of the charter money was entered as follows: "May 17, Charter *Kanapaha* to October 1, $10,000" (fol. 276; Test. Macdaniel, fols. 287, 295, 302-3, 341-356). The *Sun* also provided accommodation for reporters of other papers on board

the yacht, and received payment for the accommodation furnished (Test. Macdaniel, fols. 317–323).

5. The *Sun* insured the yacht for £12,000 by insurance expiring September 2nd. (Test. Macdaniel, fols. 282–293 : Percy Chubb, fols. 926–938 ; Sidney Chubb, fols. 771–790).

6. It was publicly stated in the columns of the *Sun* newspaper that the yacht had been chartered, by such statements as the following : "The *Kanapaha* was chartered by the *Sun* before the outbreak of the war as a despatch boat" (Fols. 382–3).

7. It appears that Mr. Lord also hired other yachts called *Premier* and *Carbonaro*, which were used by the *Sun* during the war (fols. 335, 752–4, 863).

8. Finally, the testimony of Mr. Dana, the president of the Company, and the Chief Editor of the paper, shows conclusively that Lord's authority embraced the power to hire yachts whenever he thought it necessary (Test. Dana, fols. 1222 to 1251).

II. The next question in the case is whether the destruction of the yacht before the expiration of the charter period discharged the covenants in the charter party by which the charterer agreed to keep her in repair, to return her at the end of the charter period, and to be responsible for all loss and damage to her.

The opinion of WALLACE C. J. in the Circuit Court of Appeals discloses the reason why the respondent is not relieved of these covenants by the destruction of the yacht.

Though it be a general rule of bailments that the destruction of the thing bailed, without the fault of the bailee, relieves him of the obligation to restore it at the end of the bailment, whether such obligation be assumed, or be implied by law, it is equally true that he may by his express contract bind himself absolutely to return the thing bailed ; and, if he do so, his contract will be enforced, and the act of God, or unavoidable accident, will not discharge the covenant. Such an

obligation is assumed when the bailee covenants not only to return the thing but also to keep it in repair.

Walton vs Waterhouse, 2 Saund. 420
Bullock vs Dommitt, 6 T. R. 650
Brecknock vs Pritchard, *Ib.* 750
Phillips vs Stevens 16 Mass. 238
McIntosh vs Lown, 49 Barb. 550, 555
Warner vs. Hitchins, 5 Barb. 666
Cook vs. Champlain Transportation Co. 1 Denio 91

The principle is applied to boats no less than to other chattels and to houses.

Ames vs Belden, 17 Barb. 513, 515
Young vs Leary, 135 N. Y. 569, 576–7.

The cases last cited hold that the particular charters there under review did not impose an absolute liability upon the charterers; but they fully recognize the principle.

Such being the effect of covenants to keep in repair and to return the thing bailed, the liability of the charterer in the case at bar is removed from any reasonable doubt by the further stipulation that the charterer will be responsible for all loss and damage to the yacht.

III. The remaining question is the measure of damages. It is not disputed that this is the value of the yacht. The question in controversy is whether her value is fixed in the charter party or not.

The language of the charter would seem to be a sufficient answer to this question. It says: "that for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy five thousand dollars" (fol. 94).

If the charter is the respondent's contract, as the courts below have both held it to be, no good reason appears why this stipulation is not as binding as any other.

1. In the courts below it was urged that this stipulation is intended to raise a penalty for nonperformance and is not to be treated as liquidated damages, and, therefore, that the court must find the damages by ascertaining the actual value of the yacht. This contention is unfounded, because the stipulation in question is not an agreement that the charterer will pay either stipulated damages or a penalty upon breach of the charter It merely fixes the value of the vessel.

The distinction between the value of a thing and the damage done to the owner by the destruction of it is perfectly plain, even though the damage be exactly measured by the value.

Van Deusen v Young, 29 N. Y. 9, 36.
Roberts v N. Y. El. R R Co., 128 N. Y. 455.

2. Where parties themselves fix values, as of ships, buildings, cargoes, merchandise or other articles, their agreement is, in the absence of fraud, conclusive upon them, even though the subject of valuation have a market value and though such market value be more or less than the sum agreed upon.

Marine Ins. Co. vs. Hodgson, 6 Cr., 206.
Whitney vs. American Ins. Co., 3 Cow., 210.
P. & S. Steamship Co. vs. Phœnix Ins. Co., 89 N. Y., 559, 564–5.
Hart vs. Pennsylvania R. Co., 112 U. S., 331.
Zimmer vs. N. Y. C. & H. R. R. R. Co., 137 N. Y., 460.
Graves vs. Lake Shore R. R. Co., 137 Mass., 33.
Coupland vs. Housatonic R. R. Co., 61 Conn., 531, 545.

So in cases of insurance it is held that in any action between insurers and insured involving the value of a vessel covered by valued policy and based upon the policy, the agreed valuation is conclusive.

North of England Ins. Assn. vs. Armstrong, L. R., 5 Q. B., 244.

The same principle applies in cases of constructive total loss, where the agreed value, and not the actual value, is the basis of determination.

Irving vs. Manning, 6 C. B. (H. of L.), 391.

And this is true though the ship be shown to have deteriorated greatly when the loss occurred.

Shaw vs. Felton, 2 East, 108.

3. In the present instance the value of the yacht was fixed by stipulation, because it is hardly possible to arrive at it in any other way, for the reason stated by the respondent's master, Captain Atkinson, who said: "A yacht has no commercial value; no market value * * * The value of a yacht is a fancy value * * * A yacht has no value except a fancy valuation". (fols. 582–4.)

IV. In connection with the measure of damages, the question arose upon which the Court of Appeals modified the decree of the District Court. The District Court, holding that the agreed value of the yacht should be taken as the measure of damages, deducted from it the $10,000 charter money paid for the hire of the yacht from May 1st to October 1st. The Court of Appeals held this deduction to be erroneous, and gave judgment for the whole value; and in doing so they were clearly right.

1. The judgment of the District Court was based upon the theory that the liability of the charterer, limited in the agreement of guaranty to $75,000 (fol. 98), is extinguished *pro tanto* by the payment of the stipulated rent. If this were true it would follow that everything done by the charterer, in performance of his engagements, not only to pay rent, but also to pay running expenses, wages, pilotage, tonnage, light house and port dues, and all other dues and charges (fol. 93), would take off so much from the $75,000; and it would result that, if the running expenses of the yacht equalled or exceeded $75,000, the charterer, on the

theory of the District Court, would no longer be answerable for any further running expenses, still less for repairs, and not at all in case of the destruction of the vessel. This theory is unsound, as held by the Court of Appeals, because the object of the parties was to indemnify the owner against damage to or loss of his yacht, and not to provide a fund for supplying news to the readers of the New York *Sun* at the eventual cost of the owner of the yacht in case she should be lost while engaged in that business. The agreement by which the charterer's liablity is limited, while called an agreement of suretyship, is, in truth, in terms of a guaranty.

Hall vs. Farmer, 5 Den. 487
Gallagher vs. Nicholls, 60 N. Y. 438, 444.

No liability accrues to the guarantor until breach of the principal agreement; and the measure of his liability in that case is the damage resulting from the breach. But the District Court held that the amount expended in performing a stipulation of the charter, that is to say, the $10,000 paid for rent, was to be treated as damages for non-payment of rent.

The ruling of the Circuit Court of Appeals was, therefore, right.

V. The respondent's exceptions to rulings on questions of evidence taken during the trial were not pressed in the Circuit Court of Appeals, and, so far as they have any importance, are all involved in the principal questions already alluded to.

Third. The application for writ of *certiorari* should be refused.

GEORGE ZABRISKIE
J. ARCHIBALD MURRAY
Of Counsel for Libellant.

Supreme Court of the United States.

WILLIAM L. MOORE,
Appellee,

AGAINST

THE SUN PRINTING AND PUBLISHING COMPANY,
Appellant.

POINTS FOR APPELLEE.

This cause is brought here by writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court modifying a decree of the District Court for the Southern District of New York, and remanding the cause to the District Court with instructions to enter a decree for the appellee (the libellant below) for $75,000 and interest from October 1, 1898, with costs to the libellant.

Certiorari, Transcript of Record, p. 284.
Decree, p. 283.

The decree of the District Court, dated August 23, 1899, awarded to the libellant $65,000, with interest and costs, as damages for the loss of the yacht *Kanapaha*, belonging to the appellee, chartered by the appellant, and lost while in the appellant's services.

Decree of District Court, Transcript p. 268.

The appellee (the libellant) appealed to the Circuit Court of Appeals on the ground that the damages awarded were insufficient.

Transcript, p. 277.

The appellant appealed on the grounds that the appellant is not liable at all; and that, if liable, the damages awarded were excessive, being computed upon an erroneous principle.

Transcript, pp. 269–276.

The principal questions, both in the Court below and here are, first, whether the appellant or its agent Lord, who was its managing editor, was the charterer; second, whether the appellant is liable to the appellee for the loss of the vessel pursuant to the stipulations of the charter-party; third, whether the measure of damages is the value of the vessel as stipulated in the charter-party.

The charter-party is Exhibit B annexed to the answer (Transcript, p. 15). It is connected with a contract called an Agreement of Suretyship (Exhibit C, Transcript, p. 16).

Statement of Facts.

I. The appellee was the owner of the *Kanapaha* (p. 23), a steam yacht of 240 tons burden, 187 feet long, 23½ feet beam, drawing 10.10 feet when loaded (p. 190).

The appellant is a corporation engaged in the business of printing and publishing the New York *Sun* (Libel, p. 1; Ans. p. 9).

II. April 1, 1898, the appellee, by Thomas Manning, his agent, described as owner, and Chester S. Lord, on behalf of the appellant described as hirer, executed a charter party, by which the owner let and the hirer hired the *Kanapaha* for the term of two months from the date of the charter, expiring June 1st next

ensuing, for the sum of $5,000, payable on the signing of the agreement.

The charter provides that the owner shall deliver the yacht in Manning's Basin in South Brooklyn to the hirer, or his representative, as it now is and with all its gear, tackle and furnishings as they now are; that the hirer will overhaul and repair and put the yacht in commission at his own expense, and from now on until the expiration of the contract will pay its running expenses including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light house and port dues and any and all other dues and charges; that he will use it as a yacht only.

The charter contains the following special provisions: the hirer "will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract to the owner or his agent at Manning's Basin, foot 26th Street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description;"

Also "the hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like;"

Also "the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, tackle, spars, furniture, gear, boats, and the like, in repair;"

Also "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of Seventy-five thousand dollars ($75,000.00) and the said hirer shall procure security or guarantee to and for the owner in the sum of Seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract."

The agreement was signed by Manning, as agent; and by the hirer in the following terms: "Chester S. Lord for the Sun Printing and Publishing Association." (Charter, Exh. A, p. 14).

III. On the same day an instrument described as an "understanding and agreement of suretyship" bearing the same date was executed and delivered to the libellant which recited that, whereas, by the charter party dated April 1, 1898, William L. Moore, called the owner, did or is about to hire or charter unto Chester S. Lord, called the hirer, the steam yacht *Kanapaha*, as will more fully and at large appear by a copy of said charter party "hereunto annexed and hereby made part hereof;" and proceeded to state that at the request of the hirer, and for valuable consideration received from him, and in consideration of one dollar, "We the Sun Printing and Publishing Association of the City of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

"First. That the said hirer will well and faithfully perform and fulfil everything in and by the said annexed agreement on his part to be kept and performed.

"Second. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

"Third. That our liability hereunto shall in no case exceed the sum of Seventy-five Thousand dollars ($75,000.00).

"In witness whereof we have hereunto set our hands this 1st day of April, 1898."

This instrument is signed "Chester S. Lord, for Sun Printing and Publishing Association." On the same day it was acknowledged by Mr. Lord before a Notary Public, who certified that Lord was known to him "to be the Managing Editor of the Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed." (Exh. 12, p. 257 ; cf. pp. 73, 131-2, 212).

IV. May 14, 1898, the yacht being in the possession of the appellant, and in use as a despatch boat in Cuban waters, gathering news of the progress of the Spanish War, a second charter was executed by the same persons.

It provides that the owner lets and the hirer hires the said yacht as she is now for the term of four months from the first day of June, expiring on the first day of October next ensuing, for the sum of $10,000 payable on the signing of the agreement.

It further provides that the hirer will carry out the provisions of the charter party made on the 1st day of April last, "and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses."

The special covenants quoted from the first charter are repeated in this in the same language.

It is signed "Chester S. Lord for the Sun Printing and Publishing Association" and by Manning (Ex. B, p. 15).

V. Concurrently with this charter party a second agreement of suretyship bearing date May 14, 1898, and referring to the second charter party, but in all other respects like the earlier one, and executed and acknowledged in the same way, was made and delivered (Exh. C, p. 16).

VI. The two charter parties and the second agreement of suretyship were produced on the trial by the

appellant (p. 24). The appellee produced the counterparts, and the first agreement of suretyship (pp. 192–3).

VII. Immediately after the execution of the charter of April 1, 1898, the yacht, being then at Manning's Basin (Test. Petersen, p. 25), was delivered to Captain Packard (pp. 26, 28–30) who had been hired at the office of the *Sun* in New York (pp. 180–2), and was taken by Packard's men to Tebo's Dock, 23rd Street, Brooklyn (p. 30), where she lay through the next day. In the morning she was docked for a few hours and afterwards coal and provisions were put on board (pp. 32–3), and that night she sailed for Key West (pp. 33-4).

VIII. The charter money payable under both charters was paid by appellant's checks: the first, by a check for $5,000, dated April 2, 1898, signed in the name of W. M. Laffan, Manager, by L. O. Macdaniel, (Exh. 6, p. 44); the second, by a check for $10,000 dated May 14, 1898, signed by Thomas Hitchcock, Secretary, and W. M. Laffan, Manager, (Exh. 7, p. 45). The earlier check was paid through the Clearing House April 2, 1898, and the later check May 16, 1898 (pp. 62–3).

Both these checks were paid out of the funds of the appellant *(Test.* Macdaniel, pp. 42–3*)*, and both were entered in the cash book and journal, and thence, included with other items relating to expenses connected with the Spanish war, were carried into the ledger, *(Test.* Macdaniel, pp. 47–50*)*.

The cash book entry in regard to the earlier check was made under the heading "Editorial Expense" and reads: "Yacht *Kanapaha*, 5,000" (p. 49). The cash book entry of the later check reads: "Editorial Expense; Yacht *Kanapaha* $10,000." (p. 50).

The journal entry of the earlier check is: "Yacht *Kanapaha*, 5,000" (p. 47), and of the later check: "Charter *Kanapaha* to October 1, $10,000." (p. 69).

They were carried into the ledger under the head "Editorial Expense" (pp. 49–50).

IX. After the charter at the request of the appellant the firm of Chubb & Sons, Marine Underwriters, in the City of New York, effected insurance on the *Kanapaha*, to the amount of £12,000. for two months from April 2, 1898 (*Test.* Percy Chubb, p. 176 *et seq.*; Sidney Chubb, p. 147 *et seq.*) The insurance was continued for the same amount from June 2, to August 2, and afterwards for one month from August 2 to September 2 (147–8); and was then suffered to lapse.

The bills dated April 23, June 11, and July 30 were made out to the Sun Printing and Publishing Association (Exhs. 8, 9, 10, pp. 255–6). These bills were paid respectively June 1, July 12 (by Manager Laffan's check No. 39,812) and August 16 (by Manager Laffan's check No. 40,423).

The receipted bills were produced by the appellant's Cashier, Macdaniel, (p. 52), who also produced and exhibited the entries of the several payments in the *Sun's* books of account kept by him (pp. 51–53).

X. From the time the yacht was chartered until she was wrecked, she was in the service of the *Sun* as a despatch boat, under the management of reporters of the *Sun:* first, Anderson, then Spears and, finally, Chamberlin, who were employed in obtaining and transmitting to the *Sun* news of the operations of the fleets and armies engaged in the war in Cuba.

Anderson took charge of the boat on the day she sailed from New York, and remained until the latter part of July. Spears went on board at Key West about April 20, and remained until the latter part of May (*Test.* Anderson, pp. 75–6). When Spears came on board he superseded Anderson in control, and directed the movements of the boat (p. 77). On his departure Anderson was again in control until Cham-

berlin came (pp. 77–8), and Chamberlin held the control from his arrival about the middle of June until the boat was wrecked (*Test.* Chamberlin, p. 162).

XI. It is admitted that during the whole of the period covered by the charter until the loss of the yacht all her expenses were paid by the *Sun* (p. 58). The funds were disbursed by the reporters from time to time in charge while she remained afloat, and after the wreck Captain Atkinson (who had succeeded Captain Packard) received some money in New Orleans from the *Times-Democrat*, at the request of the *Sun*, and was finally paid off at the *Sun* office by the cashier (*Test.* Atkinson, pp. 115–118; Anderson, pp. 78–9; Chamberlin, pp. 161–2).

During the whole period representatives of other newspapers were from time to time carried on the *Kanapaha*, for whose accommodation the *Sun* received payment (*Test.* Harper, p. 152; Lee, p. 172; Wardman, p. 179; Paine, p. 150: Anderson, pp. 78–9; Macdaniel, pp. 58–9).

XII. Mr. Lord, by whom the charters were executed, was Managing Editor of the *Sun*, and had entire control of all arrangements connected with getting news. Neither Mr. Dana, the Editor in Chief of the paper and the president of the corporation, nor the Board of Trustees, nor any officer or trustee of the company ever interfered in the management of this part of the business (*Test.* Dana, pp. 232–41; Macdaniel, p. 245; Bartlett, pp. 248–9; Hitchcock, pp. 157, 158).

Lord had been in the service of the *Sun* in the same capacity for twenty years, and is still in its service (*Test.* Dana, pp. 237-244).

XIII. The *Kanapaha* was wrecked and became a total loss September 5, 1898, while bound from Ponce, Porto Rico, to Havanna by way of the old Bahama Channel, by striking a reef two miles off the north

coast of Cuba at a point six or seven miles east of the entrance to Nuevitas Harbor, at about a quarter before eight o'clock in the evening. The sun had set about half-past six, and at the time of the stranding it was quite dark, though the night was fine and clear. The sea was smooth, and there was a light air from the northeast (*Test.* Gaspar, pp. 25, 26, 86, 87; Atkinson, pp. 103, 104). The yacht was proceeding at the rate of about twelve knots an hour (*Ib.* p. 99). She left Ponce on August 30, or September 1, and stopped for coal at the Port of Cape Haitien, and left that port on the evening of September 3 (Atkinson, p. 98). About eight A. M. on the morning of the 5th land west of Cape Lucretia was sighted 30 or 40 miles distant, and the Cape itself was passed at a distance of about six miles towards the middle of the day (*Test.* Atkinson, pp. 98, 100, 219, 224, 225, 226). At eight A. M. the course was set west by north three-quarters north (p. 219), which was continued until five o'clock in the afternoon, when it was changed to northwest by north (p. 219).

At that time the yacht was supposed by the master to be 25 or 30 miles east of Maternillos Point (pp. 221-3). If his estimate of his position be correct it would appear from the chart that the ship was then somewhat east of Point Manati.

Nuevas Grandes, as shown upon the chart, lies about seven miles northwest of Point Manati. From Nuevas Grandes to the eastern point of the entrance to Nuevitas Harbor is 12 to 15 miles (*Test.* Knight, p. 188). This point is called East Point: the western point of the harbor is Maternillos.

A reef runs along the coast between Nuevas Grandes and the mouth of Nuevitas Harbor (*Test.* Knight, pp. 188, 189). It is well known to navigators (*Ib.* pp. 189, 190). Although not fully delineated on the United States charts, it is shown on the British Admiralty charts (Exh. 16, p. 189; *Test.* Atkinson, p. 127), and is described in the Sailing Directions issued

by the Hydrographic Office of the United States as follows: "Port Nuevitas del Principe. From Nuevas Grandes the coast takes a northwest direction for 13 miles to Nuevitas del Principe, is skirted by a reef *all the way*, and should not be approached within two and a half miles. (Caribbean Sea and West India Islands, Vol. 1, pp. 126, 127; pp. 195-7). The reef is from half a mile to a mile and three-quarters or two miles off shore *(Test.* Knight, p. 188*)*.

The old Bahama Channel current, branching off from the Equatorial current, divides at the east end of Cuba, part of it passing to the south of the Island and the other part of it along the north coast. This north coast current becomes perceptible off Cape Lucretia. It flows at the rate of half a knot to two knots an hour, varying with the situation and with the changes of the moon. Off Point Nuevitas del Principe it sets in shore in a direction south or south-southwest, and in the vicinity of this Point navigators make a practice of allowing for it two knots an hour *(Test.* Knight, pp. 190-1*)*. This current is well known to navigators, and, like the reef, is described in the United States Sailing Directions, before referred to, in the following terms: "On the north coast of Cuba as far west as Matanzas the current almost always sets to the westward with a force varying from ½ knot to 3 and even at times 4 knots. This westerly current is felt, but with less constancy on the eastern side of the Bahama Banks and Islands, and is due partly to the constant trade wind acting on the surface of the sea and is partly a continuation of the great equatorial current which is deflected to the N. W. by the coast of South America and moves swiftly and steadily through the passage between the Islands of Trinidad and Granada. Though not invariable, the experienced navigator should vigilantly guard against the effects of this probable current by *never losing an opportunity by night or day of verifying his position.*" (Sailing Directions, *supra*, p. 5; pp. 205-6*)*.

Though the coast line of the north shore of this part of Cuba lies low, it is visible east of Nuevas Grandes at a distance of 12 miles off shore, from an elevation 14 feet above the water *(Test.* Knight, 192-3*)*, which was the elevation of the bridge of the *Kanapaha (Test.* Lewis, pp. 189–90*)*.

Captain Atkinson, who was in command of the vessel, testifies that he was familiar with that part of the coast (p. 103), and had traded several years on the north side of Cuba (p. 112).

The vessel having passed Cape Lucretia, as before stated, toward the middle of the day, the captain ascertained his latitude by observation, but did not take the longitude *(Test.* Atkinson, 127-8*)*. The compasses were correct (pp. 100, 128). The yacht was sailing all day about 12 knots an hour *(Test.* Atkinson, p. 120*)*. *The captain did not take his bearings at any time during the afternoon.* He testifies that he ascertained his position and his distance off shore by the course steered and the distance logged (pp. 127–8) —that is to say, by dead reckoning.

Continuing the same course, at five P. M. he supposed himself to be 25 or 30 miles to the eastward of Maternillos Point, on which is the light at the westerly point of Nuevitas Harbor (pp. 221–2), and from the position in which he then supposed himself to be expected to pass the Maternillos Point light, steering a course northwest by north, at a distance of six miles from the shore, a course which, if his position had been what he supposed, would have carried him directly into the old Bahama Channel (pp. 221, 100, 219). He expected to make Maternillos Point light at six o'clock (pp. 203, 198–9).

The sun set between quarter and half-past six, and ten or fifteen minutes later it became dark (p. 122). At that time he supposed himself about six miles off shore (p. 125).

He had not made the lights at Nuevitas Harbor up to the time of the stranding of the vessel. In point of

fact the lamps of the Maternillos light and the Eastern Point light had been destroyed by the Spaniards during the war and had not yet been replaced, so that no lights were burning there on that night (Atkinson, pp. 102–3, 125 ; Chamberlin, p. 166).

About 7:45 P. M.—the assistant engineer, Gaspar, says it was 12 minutes to 8 (p. 36)—the yacht stranded on a reef about two miles off shore and about six or seven miles east of the entrance to Nuevitas Harbor (Atkinson, pp. 103–4, 126, 217). The night was dark, but very fine for seeing a light, without fog (Atkinson, p. 103 ; Chamberlin, p. 166). At the time of the wreck three persons were standing on the bridge with glasses trying to make out the lights which they had been expecting to see for nearly two hours past (Chamberlin, p. 167 ; Atkinson, pp. 221–2, 217). The captain was on deck, though not on the bridge *(Ibid)*. The surface of the sea was perfectly smooth, as smooth as a floor (pp. 103–4) ; and there was nothing on the water to indicate the presence of the reef *(Ib)*.

At the time the ship struck, the Norwegian steamer *Albus*, bound from New York to Nuevitas, was following in the wake of the *Kanapaha* at a distance which the captain estimates at one mile, and Chamberlin, who was on the bridge when the ship struck, at five to ten miles (p. 167). The captain put out a boat and pulled towards her for the purpose of warning her to change her course and telling them that his ship was ashore (Atkinson, pp. 105–6), and to ask the Norwegian to stand by until morning (Chamberlin, p. 168). Two hours and a half or three hours after the stranding all went ashore from the yacht (Chamberlin, p. 169). The next day the sea was too rough to go on board the yacht, but the day after Atkinson and Chamberlin went aboard (Atkinson, pp. 127–8 ; Chamberlin, pp. 169–70).

The log and charts were lost (Atkinson, p. 225). No reason is given why at least the log was not rescued by the captain either when he left the yacht the night she struck, or on his return the second day after.

The result of these details is that the stranding of the vessel was due to her being 4 miles out of the position where the master supposed her to be; and this mistake is attributed by him to the absence of the lights he expected to see; to the current, of which he says he was ignorant; and to the imperfection of his chart in not indicating the reef at the point at which the vessel struck (Atkinson, pp. 100–1).

Neither of these excuses is valid, as will be shown more at large in the Points following; and the result is that the loss of the vessel was due solely to the negligence of those who were in charge of her.

XIV. In the District Court it was held by BROWN, J., that the charter was the contract of the appellant and not of Lord; that the appellant was liable for its failure to return the yacht to the owner on the expiration of the charter, October 1, 1898; that the measure of damages was the stipulated value of the yacht at the beginning of the charter, $75,000, less the hire, $10,000, paid on the execution of the charter. The Court deducted the hire on the theory that as the liability of the charterer was limited by the stipulations of the agreement of suretyship to $75,000, this liability was in part for the payment of the hire, and was diminished *pro tanto* by such payment (Opinion, p. 262).

The Circuit Court of Appeals held, in the opinion delivered by WALLACE, C. J., that the appellant was the charterer, and adopted the reasoning of BROWN, J., in the District Court on that point; that the destruction of the vessel during the charter period did not discharge the appellant's express covenants assuming responsibility for all loss and damage to the vessel and stipulating to return her at the end of the term; that the stipulation as to value was intended to fix her value in case of injury or destruction as the basis of damages, and that the clause limiting appellant's liability to $75,000 did not operate to deduct the $10,000 charter hire paid in advance from the damages caused by

failure to perform the stipulation to return (Opinion, p. 278).

First Point.

The charter parties and the so-called agreements of suretyship are the contract of the Sun Printing and Publishing Association, the appellant.

I. They are so in form.

1. In the agreements of suretyship (pp. 16, 257), the *Sun* is expressly named as the contracting party in the body of the instrument; they are signed by Chester S. Lord "for Sun Printing and Publishing Association," and he, described as Managing Editor, acknowledged that he executed the same "for and on behalf of his firm, under authority of said company as its act and deed."

The certificate of acknowledgment (p. 17) was executed by Bradley, a notary, who was also Advertising Manager of the *Sun*.

Test. Bradley, pp. 174–5.

This instrument plainly purports on its face to be the contract of the *Sun*.

2. In the charter party of May 14 (p. 15), as well as in the earlier charter of April 1 (p. 14), Lord, without further description, is named as hirer in the body of instrument; but the signature is, "Chester S. Lord, for the Sun Printing and Publishing Association."

Such a signature shows that he did not sign it for himself, and that he did sign it for the company: and thus signed the instrument becomes the act and agreement of the party for whom it was signed, supposing,

of course, that the agent had authority thus to contract for the principal.

Prentice v. U. S. Steamship Co., 58 F. R., 702.
Alexander v. Sizer, L. R. 4, Exch. 102.
Hill v. Miller, 76 N. Y., 32.
Tucker Mfg. Co. v. Fairbanks, 98 Mass., 105.

3. If the obligation of the charter party were ambiguous in the absence of surrounding circumstances tending to show whether it was the contract of Lord or the contract of the *Sun*, the agreements of suretyship obviate any doubt. Those agreements speak of the charter party as "hereunto annexed, and hereby made part hereof," and declare "the intention of this understanding being to hold us primarily liable under the terms of the annexed agreement."

This gives a construction to the charter parter, by declaring the meaning and intention of the parties. It is not a mere guarantee of performance by Lord, but is an interpretation of the charter and declares that the *Sun* is primarily liable thereunder. If the charter were Lord's contract he would be primarily liable; if it were not his contract the *Sun* would be primarily liable; and this interpreting agreement by declaring the primary liability of the *Sun*, shows that the charter is the *Sun's* contract.

4. It is immaterial that the obligations of the principal are expressed in two instruments rather than one: in the charter party, and in the interpreting agreement, or agreement of suretyship, by which the primary liability under the charter party is expressed to be assumed by the principal.

If the agent had authority to bind the respondent by a charter party, he could make the contract in his own name for its benefit, and execute an instrument by which his principal made itself responsible for the performance of the terms of the charter.

Arnot v Erie R. Co. 67 N. Y. 315.
Green Bay &c R. Co v Union Steamb. Co. 107 U. S. 98.

II. If regard be paid to the situation and the intention of the parties it is clear that the charters are the contract of the *Sun*, and not of Lord individually.

1. It is well settled that such evidence is competent, the instrument not being under seal.

Mechanics Bank v. Bank of Columbia, 5 Wheat. 526.
Whitney v. Wyman, 101 U. S. 392
Metcalf v. Williams, 104 U. S. 93
Hitchcock v. Buchanan, 105 U. S. 416
Pearson v. Post, 108 U. S. 418.
Woodhouse v. Duncan, 106 N. Y. 527, 531.
Story, Agency, §§ 160*a*, 270.

2. Where an agent's principal is known the presumption is that the agent contracted in his behalf; and if the principal claim that the other party dealt with the agent as principal, and not in his quality of agent, he assumes the burden of establishing this by clear proof.

Meeker v. Claghorn, 44 N. Y. 349.
Butler v. Evening Mail Ass'n, 61 N. Y. 634.

3. The testimony shows that Lord was, and was known to be, agent for the *Sun*, and it does not appear that either he or the owner regarded the transaction as that of Lord, and not as that of the *Sun*.

(a) The yacht was first chartered April 1, by a charter party in which Lord was named as Hirer, but signed by him "Chester S. Lord for the Sun Printing and Publishing Company" (p. 14). By the supplementary agreement of April 1 the *Sun* assumed responsibility as hirer (p. 257). In the second charter party the first is referred to in the following terms: "The Hirer will carry out the provisions of the charter party made on the first day of April last."

The effect of the supplementary agreement of May 14, Exhibit C (p. 76), was to make the *Sun* in terms primarily liable for the performance of this engagement.

The first charter party was negotiated by Chamberlin, a reporter for the *Sun* (*Test.* Chamberlin, pp. 159–

60), with the co-operation of Capt. Packard, who commanded the yacht for about two months (*Test.* Packard, p. 178) Packard was summoned from New Brunswick by a messenger who asked him to report at the *Sun* office. He went there, and talked with Chamberlin and with Anderson another reporter in the service of the paper (*Test.* Anderson, pp. 75-6); and these two reporters made an appointment for him to meet Manning, the yacht broker, who subsequently executed the papers as agent for the owner.

After futile efforts to obtain a yacht called *Vamoose*, Captain Packard recommended the *Kanapaha* and two or three other yachts as suitable for the business of running despatches during the war (pp. 181-2). The *Kanapaha* was engaged, and was chartered for two months for $5,000 by a charter party which provided that the charter money should be payable on the signing of the agreement. In accordance with this provision Manning received a check for $5,000 dated April 2, 1898, payable to his order, and signed "W. M. Laffan, Manager, pr. L. O. Macdaniel." The check bore in the margin the name "*The Sun*". (Exh. 6, p. 44). It was drawn by Macdaniel, the Cashier for the *Sun* (*Test.* Macdaniel, pp. 42-43), and delivered by him to Mr. Lord (p. 45). It was received by Manning on the same day and deposited by his clerk on the same day to Manning's credit (*Test.* St. Johnston, pp. 131-2). The stamp on the check shows that it was paid through the Clearing House (p. 44).

The yacht having meanwhile been docked, provisioned and coaled, was put in commission, and sailed under the command of Captain Packard and in charge of Mr. Anderson, a reporter for the *Sun*, on the evening of April 2 or 3. (*Test.* Anderson, p. 75; Packard, p. 180; Petersen, pp. 31-33).

(b). The second charter party, as already stated, was made May 14, and at that time the boat was still under the first charter and was in the service of the *Sun* in Cuban waters. Anderson was still on board, but the

yacht was then in charge of Mr. Spears, another reporter, who took charge about the 20th of April and retained it until the latter part of July, when he was superseded in the command by Mr. Chamberland (*Test.* Anderson, pp. 75, 76, 77, 78).

(c). It does not appear from the record who negotiated the charter party of May 14 on behalf of the *Sun*, but the charter provided that the hire of the yacht for the four months from June 1 to October 1, $10,000, was payable on the signing of the agreement. Accordingly, on the same day a check of the *Sun* for $10,000, dated May 14, payable to the order of Thomas Manning and signed by Thomas Hitchcock, Secretary, and W. M. Laffan, Manager (Exh. 7, p. 45) and not drawn by Macdaniel but by some other person (*Test.* Macdaniel, pp. 45–6) was received at Manning's office and deposited by his clerk, St. Johnston, to his credit May 16 (*Test.* St, Johnston, pp. 131-2) and, like the first check, was paid through the Clearing House (p. 45).

(d). As against this contemporaneous evidence that Lord appeared to be acting on behalf of the *Sun* for the purpose of procuring a vessel to be used to gather news for the use of the paper, there is no evidence whatever to show that either he or the owner believed or suspected that Lord was acting in his own behalf in making the contract for the charter of the yacht rather than in behalf of his principal in whose business it was to be employed.

4. The yacht having been thus chartered, the appellant admits that it put her in commission, made such repairs as were necessary to that end, and furnished all necessary provisions, coal and other supplies (*Answer*, p. 11); that the yacht was used for the purpose of enabling the representatives of the appellant, and also the representatives of other newspapers, to observe the naval and military operations in the vicinity of the Island of Cuba (p. 12); that Anderson, Spears and Chamberlin were employed by the appel-

lant as reporters on the yacht from April 2 to September 5, 1898, and that their duties were to transmit news for the use of the paper (p. 19).

It was admitted on the trial that the appellant paid all the running expenses of the yacht from the making of the second charter party to the time of the loss, including the wages of the captain, Atkinson, who was in command during that period (p. 58).

The testimony further shows that the yacht was insured for account of the appellant through Chubb & Son, marine underwriters, at the request of the *Sun*, and that the premiums were paid by the appellant and charged up in its books kept in its office *(Test.* Macdaniel, pp. 50–53; Percy Chubb, pp. 176–9; Sidney Chubb, pp. 146–50*)*. The insurance was for £12,000 and expired September 2 (pp. 146–7). It was taken out, according to the English practice, in the name of C. T. Bowring & Co., Insurance Brokers and Ship Agents in London, who are the correspondents of Chubb & Son (pp. 147–8).

Many details of the payment of the expenses of the ship, crew and reporters by the respondent are disclosed by the record (Test. Anderson, pp. 79, 80; Chamberlin, pp. 161–2; Packard, pp. 163–4; Atkinson, pp. 115–116, 115–118).

SECOND. Lord had authority to make the contracts in suit.

I. The appellant's charter and by-laws are consistent with the authority he exercised.

1. The appellant is a corporation organized under the Manufacturing Corporation Law of 1848 of the State of New York. The certificate of organization, executed September 27, 1867, and filed September 30, 1867, in the Office of the Secretary of State, is in evidence (p. 328).

Originally incorporated by the name of "The Evening Telegraph Association", the name was changed by Act of the Legislature, passed January 24, 1868, to

"Sun Printing and Publishing Association" (Exh. 2, p. 331).

The objects for which the company is formed are described in the organization certificate as "the printing and publishing of a daily newspaper in the City of New York, and generally the business of printing and publishing books, pamphlets and newspapers."

The certificate contains no definition of or restriction upon the powers of the trustees, officers or agents of the Company.

2. The by-laws are in evidence (Exh. A., p. 260), and contain no definition of the powers of the trustees or of any officer or agent of the Association; and the only restriction upon the powers of the trustees is that they shall not sell or alienate the title and good will of the *Sun*, nor sell the real estate belonging to the Association, without first calling a meeting of the stockholders and obtaining the consent of the holders of two-thirds of the whole stock.

The only duties prescribed in respect to any of the officers are that the President and Secretary shall sign all certificates of stock and make all transfers of the same on the books of the Association.

Provision is made for two standing committees of the board of trustees—namely, an executive committee and an examining committee. The duties of the executive committee were to have the supervision of all the property of the Association contained in their building and of the building itself. It was made the duty of the examining committee to examine the accounts of the Association and to inquire into both the receipts and disbursements of money, and to report to the trustees at each regular meeting (Article VII., p. 261).

The by-laws were amended June 28, 1898, a date at which the *Kanapaha* was in the service of the appellant, by leaving out all provisions relating to executive and examining committees (Amended By-Laws, Exh. 13, p. 341).

II. It is not shown that in making the contracts in suit Mr. Lord had usurped authority which had been restricted to the board of trustees, or to any other officer or agent of the company.

At the time the charters were executed there were only four trustees—Paul Dana, who was also the President of the Association; Thomas Hitchcock, Secretary; William M. Laffan; and Franklin Bartlett (Ans. to Third Interrogatory, p. 18). Edward P. Mitchell, who is named in the answer as a trustee, was not elected until May 23, 1898 (*Test.* Dana, p. 229).

1. Mr. Dana, in addition to being President of the corporation, is the Editor-in-chief of the paper (Test. Dana, p. 230). His particular work is to direct the political policy of the paper and from time to time to write editorials; but with the active management of the paper, in connection with getting news and the publication of it, he concerns himself only to a very slight degree (pp. 235–6). He does not attempt to go into the details of the work of the editorial department in charge of the Managing Editor (p. 234).

2. Mr. Hitchcock, the Secretary of the Board, has charge of the financial department of the paper and confines himself to that department, and to the writing of the Monday morning financial article and occasional editorials on financial subjects. He does not concern himself with the means taken by the editorial department to acquire news, and he had no occasion to acquaint himself with what was being done by the *Sun* in connection with the Spanish War. He knew that boats were used by the *Sun* during the war, but he says he did not know their names or how many there were or who had obtained them (*Test.* Hitchcock, pp. 157, 158).

3. Mr. Laffan, the Business Manager, was not called as a witness, and sailed for Europe April 22, while the trial, which began April 14 (p. 22), was in progress (p. 229). He manages particularly the financial or business part of the office (p. 145). His powers and

duties are not shown to affect the questions in this suit, beyond the fact that a bank account of the respondent is kept in his name, on which checks are drawn at Lord's request (pp. 42, 45, 69, 70), and the fact, already adverted to, that he signed the check given in payment of the charter money.

4. Mr. Bartlett is counsel for the *Sun* and takes no active part in its business management except to give his opinion on instruments in writing to be executed by the corporation which are submitted to him, to attend to its law business, and to attend the meetings of the Board of Trustees, and vote on such qusstions as come up for decision (Test. Bartlett, p. 248).

5. Mr. Mitchell also was called as a witness. He was not a trustee at the time either of the charters was executed but was elected May 23, 1898, nine days after the execution of the second charter (p. 229).

III. Mr. Lord's authority is neither expressed in nor restricted by the by-laws of the association, nor by any resolutions or other formal acts either of the trustees or of the stockholders. It is, therefore to be inferred from the course of the business and from the things he was required or permitted to do in the performance of the work in which he was engaged.

1. The same remark applies equally to all the officers and employees of the company. Without exception their powers and authority are to be found in following the same line of inquiry.

2. In the appellant's answer to the fifth interrogatory, annexed to the libel, Lord's duties are described as follows: "A general oversight over the news columns of the papers. He hired some of the reporters and signed some of the payrolls. His particular functions were to see to the making of the paper over night. Such duties are not defined in the By-Laws of the Board of Trustees or in writing. The powers and duties of the said Lord for the purpose of procuring news and information for publication in said newspaper were to make arrangements throughout the

United States with local agents for furnishing and transmitting news. He also had the power to buy items of news from any source; and he had some latitude in hiring reporters, but such action was subject to confirmation by the Editor-in-chief." (p. 18).

There is no attempt to show by the evidence that his authority was limited to the particulars mentioned in this answer: on the contrary the evidence shows that his duties and powers were much more extensive than the answer admits.

3. The business of the *Sun* is divided into two general departments, the editorial department and the publishing department; Mr. Lord being in charge of the editorial department with the title of Managing Editor, and Mr. Laffan in charge of the publishing department as the Business Manager *(Test.* Dana, pp. 240–1*)*.

4. The matter of obtaining news is under the charge of the Managing Editor (p. 241). Disbursements connected with his department are made upon his order.

The Cashier has general instructions to honor his orders in writing *(Test.* Macdaniel, p. 245*)*, and the practice is that when oral instructions are given by Mr. Lord in regard to the disbursement of money the Cashier himself writes Lord's name on the bills authorizing their payment (pp. 245–6).

No trustee is specially designated to overlook the financial matters of the paper, which are in general charge of the bookkeeper Macdaniel *(Test.* Dana, pp. 234–5; Macdaniel, pp. 247–8).

In all matters that relate to editorial expenses the bookkeeping is under Lord's control *(Test.* Dana, pp. 234–5*)*.

4. His authority is such that in all matters connected with his department he acts without resorting either to the Board of Trustees or to the president (whose office is only two rooms from his own) or to any other officer or agent of the Company.

In particular his authority is conceded to have been thus absolute and sufficient with regard to procuring information or news for publication relative to the war in Cuba, with regard to the sending of reporters or other employees to obtain such news or information, and with regard to the employment of such suitable and requisite means as might be necessary to enable the reporters and other employees to procure such news or information (Sixth Interrogatory, p. 6, and Answer thereto, p. 18). No authority from trustees or officers was required for these purposes, because without any instructions or directions from any other source, as Mr. Dana testifies, Lord had charge of all details connected with such matters *(Test.* Dana, pp. 232–3*)*.

5. The authority which Lord had and exercised with regard to obtaining news about the Spanish war was not peculiar to that occasion, but was only an incident of his general authority.

No one else interferred in such matters, or concerned himself in any way, or to any extent, with getting news, or the means to be employed for that purpose. No one else appears to have authority to do so.

The Editor-in-chief expressly disclaims any concern about such details as to where reporters should go, and what means should be taken to get information. He did not in any way concern himself with the details in connection with the use of despatch boats by the *Sun* for getting information; and the reason why he did so was, as he says, because Mr. Lord had charge of all that *(Ib.*, pp. 232–3*)*. He is careful not to place any limitations upon the extent of Lord's authority in such matters.

6. At the same time that Mr. Dana thought it unnecessary to enquire about details, he knew very well the broad fact that Mr. Lord was getting news in regard to the Spanish War, and knew that Lord made the arrangements for getting it, because he testifies that from time to time he asked Lord if his arrange-

ments were satisfactory, or some general question of that sort; but he adds that the arrangements were left to Lord, and it was understood by himself and by the other trustees that if the arrangements were satisfactory to Lord they were also satisfactory to them *(Ib.*, pp. 233–4*)*.

7. To hire boats when they are wanted is expressly admitted by Mr. Dana to be in accordance with the appellant's course of business, and within the power of Mr. Lord. He said (p. 237):

"Q. I suppose that whenever a boat would be desirable to get news you would expect a boat to be obtained? A. Yes.

"Q. And that would be just as much a part of Mr. Lord's duties as to send a reporter to get information of some events in town? A. Yes."

This would appear to be conclusive.

IV. As the whole management of the editorial department of the paper, which included the collection of news, was left by the company in Lord's charge; and, as he had authority to make such arrangements as he thought fit, not only to obtain news in general, and also, and in particular, about the war in Cuba; he had, as a necessary incident to this authority, the power to make contracts in furtherance of the purposes it was his duty to accomplish and for which his authority existed; and any contracts so made by him are binding on the appellant.

Story, Agency, §§ 58, 85, 97.
Mechem, Agency, §§ 280–311.
Nelson vs. H. R. R. Co., 48 N. Y., 498.
Meehan vs. Forrester, 52 N. Y., 277.
Hardee vs. Hall, 12 Bush (Ky.), 327.
Prentice vs. Steamship Co., 58 Fed. R., 702.

V. The evidence to which reference has now been made shows that Lord was the general managing agent of the respondent for the purpose of obtaining and publishing news.

1. In such a case, where a contract is made by any agent of a corporation in its behalf, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the act of the agent.

Railway Companies vs. Keokuk Bridge Co., 131 U. S., 371, 381.

2. In such a case, also, the burden of showing that any particular contract in the general line of the agent's duty was not within his actual authority is upon the principal; and in the case at bar the appellant has failed to show that Lord had not in reality the authority he assumed to exercise.

Patterson vs. Robinson, 116 N. Y., 193.
Holmes vs. Willard, 125, *Id.*, 75.
Hastings vs. Brooklyn Life Ins. Co., 138 N. Y., 473.
Oakes vs. Cattaraugus Water Co., 143 N. Y., 430.

VI. The appellant's attitude towards Lord since it repudiated the contracts in suit tends to support the findings of the Court below that he had authority to make them. If he had really transcended his authority, it was a conspicuous breach of the confidence which for 20 years his principals had reposed in him, and might naturally have been followed by his dismissal from their service; yet he was not dismissed; he is still managing editor; and, although the by-laws were amended after the second charter was made, and when every one knew that this and other vessels had been hired by him on some terms or other, and were actually in the service of the *Sun*, gathering war news, no fresh limitations were then or otherwise placed upon his authority. On the contrary, by dispensing with the Executive Committee and the Examining Committee, and by not altering the practice of the Board in holding monthly meetings of the most formal character, the method of doing business which left

Lord free to do as he thought best in all matters relating to getting news, seems to have had the deliberate approval of the corporation.

Mr. Lord would not have been a hostile witness for his principal. If he had intended to bind himself by the charters, and not the appellant, he would have said so. If, on the other hand, he had intended, as the owner understood, to bind the company, and not himself, he would have incurred no personal liability if it turned out that he had exceeded his authority, and he might safely have said so, if such were the truth. The omission of the appellant to call him as a witness warranted the Court below in drawing such inferences as to his authority as the evidence in the record, corroborated by his silence, will support.

THIRD. Though other proofs failed to show that Lord had had express antecedent authority to charter the *Kanapaha*, still the actual knowledge of at least three of the trustees that she had been hired, the notice to all of them and to the corporation involved in the numerous entries in the books, the use of her in the respondent's business, the payment of her charter money and running expenses, the letting of some of her accommodation for hire to other newspapers, and the published admissions in the *Sun* that she was in its service under charter, prove that the appellant knew what Lord had done, and acquiesced in it; and consequently the appellant is bound by the contract he made.

Eureka Co. vs. Bailey Co., 11 Wall, 488.
Mining Company vs. Anglo-Californian Bank, 104 U. S., 192.
Railway Companies vs. Keokuk Bridge Co., 131 U. S., 371.
Jacksonville, etc., Ry. Co. vs. Hooper, 160 U. S., 514.
Scott vs. Middletown, etc., R. R. Co., 86 N. Y., 200.
Phillips vs. Campbell, 43 N. Y., 271.
Moss vs. Rossie Lead Mining Co., 5 Hill, 137.

I. The trustees knew that Lord had hired the yacht.

1. Mr. Dana knew that the *Sun* was using dispatch boats and employing its reporters to get news of the progress of events in Cuban waters. He saw it in the paper, and from time to time talked with Lord about it. He says he heard from Lord about the *Kanapaha*, and he thinks he has heard reporters speak of it. He also knew that the *Sun* was using a boat of the name of *Premier* (pp. 231-2). He says he did not know of the use of a boat called the *Carbonaro* (p. 232), although both the *Premier* and the *Carbonaro* were under the charge of the witness Chamberlin, just as the *Kanapaha* was *(Test.* Chamberlin, pp. 163-4*)*.

Dana's knowledge was notice to the corporation.

Bank of U. S. vs. Davis, 2 Hill, 451.

2. Mr. Hitchcock, indeed, says he knew nothing about it (pp. 157-8); but he admits that he knew the *Sun* was using despatch boats during the war for purposes of observation (p. 157), though he did not know their names (p. 157-8); and in regard to the *Kanapaha* his memory is evidently at fault, because he signed the check for $10,000. in payment of the charter money under the charter in suit (p. 45, 46).

3. Mr. Laffan was not called as a witness, and therefore he may be presumed to have known it. The presumption is strengthened by the fact that he also signed with Hitchcock the $10,000. check *(ibid)*; and becomes conclusive in connection with the fact, admitted by the answer, that he made arrangements for the accommodation of reporters for other papers on the yacht (p. 19).

II. All the expenses of the *Kanapaha* are admitted to have been paid by the respondent (p. 58); and so by the terms of the charter, as explained by the supplemental agreement, it was bound to do.

III. Payments on account of the *Kanapaha*, as well as all other expenses connected with the Spanish War were entered under a special account called the

"Spanish War Account" (*Test.* Macdaniel, pp. 52, 54, 55–6), the balance of which at the close of the war was finally charged up to the Editorial Expense account (*Test.* Macdaniel, p. 55, 64–66). All matters appertaining to getting news as to the War were treated as ordinary accounts in accordance with the ordinary course of business, and were left to Mr. Lord's department (p. 235).

The expenses connected with the *Kanapaha*, being properly entered in the books of the *Sun* were audited by the auditor from time to time; and every month at at the meeting of the Board a report was made to the effect that the books were examined and were found to be correct. The method of bookkeeping is described in great detail by the witness Macdaniel and reference has been made to it heretofore. In substance, it appears that payments in the first instance were entered in the cash book, then transferred to the journal and then, with other items under the same head, under the title of Spanish War Account were transferred to the ledger. It is shown that a number of the entries distinctly mentioned the *Kanapaha* (*Test.* Macdaniel, pp. 47–66); and the entry of the payment of $10,000. under the charter in suit distinctly mentions the charter. It reads: "May 17 Charter *Kanapaha* to October 1, $10,000." (p. 50).

1. The entries in the respondent's books and the examination and approval of the accounts from time to time by the auditors and by the Board, charge the appellant with knowledge of the charter; and, by not repudiating it, the appellant adopted and ratified it.

Martin v Webb, 110 U. S. 7.
Hyatt v Clark, 118 N. Y. 563
Fifth National Bank v Navassa Phosphate Co. 119 N. Y. 256
Hanover National Bank v American Dock and Trust Co. 148 N. Y. 612

2. What the trustees are presumed to have known

they are held to approve if they do not promptly express dissent.

Gold Mining Co v National Bank, 96 U S 640
Indianapolis Rolling Mill vs St Louis etc R R Co. 120 U S 256

IV. So also the appellant provided accommodation for reporters of other papers on board the yacht, and received payment for the accommodation furnished: from the *Press*, $1444.25; from *Harper's Weekly*, $500; from *Scribner's*, $1,000. *(Test.* Macdaniel, pp. 58–59*)*.

V. The appellant has publicly admitted in the columns of the *Sun* that the yacht had been chartered by it, saying: "The *Kanapaha* was chartered by the *Sun* before the outbreak of the war as a despatch boat" (p. 71).

Admissions in a newspaper are competent evidence against the proprietor.

Frye v Bennett, 4 Duer 247, 254; 28 N. Y. 324–330.
Malloy v Bennett, 15 Fed. R. 371, 374.
Huff v Bennett, 4 Sandf. 120, 130.

FOURTH. The considerations urged by the appellant do not rebut the proof either of Lord's antecedent authority, or of the ratification of what he did by his principal.

1. Stress was laid upon the absence of any resolution of the Board of Trustees empowering Lord to charter the yacht; but this is not important. The authority of an agent is not required by the law to be expressed in the minutes of the Board; the convincing evidence of it may be found in the course of business of the company, in the things he was permitted by the company to do, and in the conduct of the company with regard to the particular thing done by its agent in its behalf.

Bank of U. S. vs Dandridge, 12 Wheat. 64.
Eureka Company v Bailey Company 11 Wall. 488.

Jacksonville etc. R'y Co v Hooper, 160 U. S, 514.

2. If it be true that the employment of the *Kanopaha* was never directly brought before the Board of Trustees pp. 228, 156); the same thing is true of the *Premier* and the *Carbonaro* which are conceded to have been employed by the *Sun* (pp. 164, 62, 142-3); but that its quite natural, for the reason that questions as to what should be done to get news never were brought before the Board, but were left to Mr. Lord *(Test.* Dana, pp. 238–9). The meetings of the Board were held once a month and were very short, not often longer than ten or fifteen minutes *(Ib.)*.

3. If it be also true that the Secretary, Mr. Hitchcock, on being asked by Mr. Lord to execute the first charter party on behalf of the Sun Association refused to do it, and also refused to execute the agreement of suretyship; nevertheless he testifies that the matter was never brought up in the Board of Trustees, and he does not say that he ever called the attention of any of the trustees to the subject, or objected to Lord executing the papers himself. So far as in him lay to approve the charter he did it by signing the check for payment of the charter money.

His refusal to executet the charter party was perfectly natural, because he had not been authorized to do so by the Board. As custodian of the corporate seal his authority to affix it to instruments appears to have been limited to such instruments as the Board of Trustees had approved and had directed to be executed *(Test.*, Hitchcock, pp. 154–5*)*.

But that Lord's authority to make contracts was not so limited is evident from the fact that Hitchcock, as well as Laffan, signed the checks for the payment of the charter money. It is fair to assame that neither of them would have done so unless Lord had authority to make the contracts.

FIFTH. The appellant having become the charterer of

the yacht, both through Lord's antecedent authority to make the charter and through subsequent ratification of what he did, all the engagements of the charter are binding, including the special covenants to put and keep the yacht in repair, to restore her at the expiration of the charter term, and to answer for any and all loss or damage to her.

I. As the hiring of the vessel has been ratified by the appellant, all the terms of the contract have been ratified; ratification cannot be partial.

Gaines v Miller, 111 U. S. 395.
Skinner v Dayton, 19 Johns. 513, 554.
Fowler v N. Y. Gold Exchange Bank, 67 N. Y. 138, 143.

II. Lord obtained possession of the vessel, in behalf of his principal, by means of the stipulations in the charter parties. Though he had not been authorized to make them, they are nevertheless binding upon the appellant because it accepted the vessel and kept it. In order to escape from the obligation of unauthorized stipulations made by an agent the principal must return the property. If not returned it is held by the principal subject to the conditions upon which it was obtained. *Qui sentit commodum sentire debet et onus.*

Wharton, Agency § 89.
Mundorff v. Wickersham, 63 Pa. St. 87.
Wheeler & Wilson Co. v Aughey, 144 *id.* 398.

Though the terms of the contract were not actually known to the principal, his ignorance will not diminish the effectiveness of his ratification if he keep the property.

Eadie v. Ashbaugh, 44 Ia., 519.

III. The appellant's contention that though it be liable as upon "an ordinary contract, express or implied, for the user of the yacht" (Appellants' Brief, p. 108), it is not liable upon the stipulations of the charter, is untenable.

1. Where there is an express contract, the law does not imply one, and, if the appellant is liable on any express contract, it is liable on the contract in suit, and on no other.

Hawkins vs. United States, 96 U. S., 689.

2. As no contract is implied where one is expressed, so the contention of the appellant is that Lord's contract is to be treated as though it had never been made. But, for reasons sufficiently stated already, that cannot be done. The appellant knew that some contract had been made, and acted accordingly. For instance, if the contract were merely implied, the appellant would not have paid the hire of the boat in advance, for the owner is not, in such a case, entitled to demand payment until the user has terminated. Neither would the appellant have paid the stipulated sums of $5,000 and $10,000 for her hire, because its liability would have been only for the reasonable value of the use, and the parties would have had to ascertain what that was.

3. If, then, there is an express contract, and the appellant is liable on it at all, it is liable on all its stipulations, for the contract is entire, and the appellant bound to perform all its provisions as the consideration upon which it has obtained the use of the vessel.

Steam Packet Co. vs. Sickles, 10 How., 419, 441.
Butler vs. Butler, 77 N. Y., 472.

4. As Lord is conceded by the testimony of Mr. Dana, to have had general authority to hire yachts when they were wanted and to arrange all details of the hiring (pp. 233–4, 236), he necessarily had power to enter into incidental engagements connected with the hiring.

Le Roy v. Beard, 8 How. 451.
Nelson v. H. R. R. R. Co., 48 N. Y. 498.

5. But authority to hire a vessel and to arrange all details certainly justifies an express engagement to return the vessel to the owners at the expiration of the charter term, because the law imposes this duty upon the hirer. If it be not fulfilled the law implies a further duty to pay her value; and this the agent may of course agree to. Whether or not this duty shall be subject to exceptions—whether the agent's engagement shall be more or less extensive than the law implies when nothing is said by the parties—is a detail. Is the agent to be silent on all details and leave everything to the law to arrange? If so, he does not arrange them. If he is to arrange them he must have authority to arrange them differently from the law, or his authority would be superfluous. So Lord, having the authority conceded by the appellant, had authority to assume for his principal the risk of being able to return the yacht, and to agree to return her at all events or else to pay for her. And that is what he did.

6. One object of the stipulation fixing the value of the vessel was to establish the amount the hirer would have to pay as equivalent for her return in case she were lost or destroyed, so that the engagement to return her could not be performed. If her value were ascertained he had just as much authority to assent to it as to any other matter of fact incident to the business. It involves no greater exercise of authority to stipulate in terms what the value is than to stipulate that she shall be valued at whatever she shall be ascertained to be worth.

7. The stipulations in question are not suggested to have been fraudulent.

They are not alleged in the answer nor shown by the proofs to be either unusual or unreasonable.

Their object is to relieve the owner of risk of losing his vessel by placing it upon the charterer. Whoever assumes the risk can secure himself by insurance; so that the practical question is in reality who shall insure the vessel, the owner or the charterer. When

the hirer assumes the risk of damage to the vessel, or of her loss whether partial or total, his engagement falls into the same category as the engagements to overhaul and repair, to pay pilotage, tonnage, light-house, port and other dues to protect against liens, to do nothing in contravention of law; for by neglect of any of these the owner is exposed to the risk of losing her.

It is not unreasonable that the hirer, who has possession and control of the vessel, should assume responsibility for her loss. If the hirer is not responsible, the owner is. But if she encounter perils of the seas or of enemies, it is the hirer who has brought her into danger for his own purposes; why is it not reasonable that he shall agree to be responsible?

If he take her away from her home port how is it unreasonable to agree to bring her back?

Should he keep her over the charter time he agrees to pay demurrage at the rate of $500 a day; and such a covenant is common enough. Why is it unreasonable to agree to pay her value if he never bring her back?

The value may be difficult for strangers to ascertain. If the parties can ascertain it to their own satisfaction, and agree about it in advance, why is it not reasonable to do so?

8. In *Le Roy v. Beard, supra*, reference was made to the acts of the parties to show the construction they placed on the agent's authority (p. 468). Applying the same test in the present case it appears the appellant understood that it had assumed the risks for which the charter stipulates. Immediately after chartering the vessel, and before she left port, the appellant caused her to be insured for £12,000, and continued the insurance when the second charter was made. The premiums were paid by checks of the company, and were entered in its accounts, which were examined by the auditor and approved by the Board of Trustees.

This indicated most clearly that the appellant considered itself answerable for the vessel's safe return; otherwise why should it have taken out insurance? It was not required by the charter to insure for the benefit of the owner, its own obligation having been accepted by him instead of insurance; and it did not do so, but made the insurance for its own benefit. The premiums amount to $3,850.32 (pp. 255–6): it is not credible that this money should have been expended unless the appellant intended to protect itself on its liability to answer for the safe return of the yacht.

This is a most unequivocal expression of an intention to assume, and to relieve the owner from, all risks that would be covered by an insurance of the vessel by the owner for his own benefit and at his own expense.

The Barnstable, 84 F. R., 895, 898; 94 F. R. 213.
Woolsey v Funke, 121 N. Y. 87, 92.

Second Point.

The loss of the *Kanapaha* under the circumstances disclosed by the record does not relieve the appellant from liability to return her to the owner, or to pay damages for not returning her.

First. Under the stipulations of the charter:

I. The Hirer stipulates that he "will surrender said yacht, with all its gear, furniture and tackle, at the expiration of this contract to the Owner or his Agent, at Manning's Basin, foot 26th Street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness,

liens or charges of any kind or of any description." (pp. 15, 16).

He also stipulates that he shall "during the continuance of this agreement at all times, and at his own cost and expense, keep the said yacht, its hull, tackle, spars, furniture, gear, boats, and the like, in repair" (p. 16).

He further stipulates that he "shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like" (p. 16).

II. These absolute stipulations for the return of the vessel, for her repair, and for the assumption of liability for her loss, are not discharged by the impossibility of returning her arising from her loss.

The Harriman, 9 Wall, 161.
Jones v United States, 96 U. S. 24, 29.
Jacksonville &c Ry Co., v Hooper, 160 U. S. 514.
Harmony v Bingham, 12 N. Y. 99.
Tompkins v Dudley, 25 N. Y. 272.
Dexter v Norton, 47 N. Y. 62.
Herter v Mullen, 159 N. Y. 28.

In *Jacksonville, &c. Ry. Co. v. Hooper, supra*, the principle is expressed as follows: "The present case * * * is a case of impossibility of performance arising subsequently to the making of the contract. Here the general rule is that such impossibility, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract. * * * Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility. But where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor within his control" (pp. 527, 528).

In *Harmony v Bingham, supra*, the distinction is pointed out between obligations imposed by the law and those assumed by express contract. "It is a well settled rule," the Court say, "that where the law creates a duty or charge, and the party is disabled from performing it without any default in himself, and has no remedy over, then the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract. * * * The only exception which has ever been acknowledged is where a party has contracted to do a thing which the law considers impossible" (pp. 107–108).

In *Herter v. Mullen, supra*, the reason for the distinction between the effect of impossibility of performance occasioned by inevitable accident or the act of God upon an obligation created by express contract, and upon an obligation which the law, implies is said to rest "upon the unwillingness of the law at once to create, impose and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence *(School District v. Dauchy*, 25 Conn., 530*)*." p. 43–44.

III. It is urged by the appellant that inasmuch as the obligation of a hirer to return the thing hired depends upon its continued existence, the obligation fails when the thing hired is destroyed; and as the *Kanapaha* was destroyed the appellant is discharged from its covenant to return her.

1. No doubt the general principle is true; and this is the contract the law presumes the parties to have made when it is not shown that they have made a different contract. Nevertheless, the parties may make a different contract if they please, and the hirer may so bind himself absolutely to return the thing without allowance for the contingency of its destruction that if

he does not return it he is liable, whatever be the cause of his failure.

Steele vs. Buck, 61 Ill., 343.
Dexter vs. Norton, 47 N. Y., 62.
Drake vs. White, 117 Mass., 10.
Warth's Executors vs. Mack, 51 U. S. App., 133.

Steele vs. Buck (supra) illustrates the principle, although the language of the covenant in that case was much weaker than in the covenant in the case at bar. The action was debt on a bond given to secure the performance of the covenants of a charter party by which the charterer, among other things, stipulated to return the vessel to her owner at the port of Chicago at the close of the navigation season for the year "in as tight, staunch and good condition as she now is, reasonable wear and tear excepted." The vessel was wrecked during the charter period and became a total loss. The Court held the sureties liable, on the ground that the contracting party must perform his contract, and if loss occur by inevitable accident the law will let it rest upon the party who has contracted that he will bear it. The distinction was adverted to between contracts implied by the law and those made expressly between the parties; in the former case performance may be excused when it becomes impossible through inevitable accident, but in the latter case the party is bound to make his contract good because he might have provided against the inevitable accident.

This distinction rests on sound reason, for in contracts implied by law no part of the obligation is expressed, and the law which imposes the duty also limits it; but where the obligation is expressed, the law presumes that the parties have expressed the whole of it, and will neither add to it nor diminish it. If, in the case cited, the charterer had not expressly agreed to return the vessel, the law, recognizing his duty to return it if it were not destroyed without his fault, would have

presumed that he had promised to do so. The duty—the moral obligation—is all that the law can presume the parties to have intended. *When*, however, the parties formulate their engagements themselves, they substitute for the performance of a duty the performance of a promise, which may be either more or less than the simple duty or moral obligation; and there is no room for presumption that they promised less or more than they meant to perform; the agreement is in writing and it cannot be altered. Consequently, there is no ground left upon which the law can raise a presumption that the parties to the charter meant that the charterer was not to be bound by his promise in any case which they have not specified. Especially is this view reasonable where, as in the case cited, the parties have themselves expressed a limitation upon the charterer's liability, by providing that if by reason of ordinary wear and tear the vessel should not be in so good condition at the end of the charter term as she was at the beginning, the charterer should not be bound by his general covenant to make good that defect. So, where the parties have considered the subject of exceptions and limitations, and have expressed some and omitted others, the law cannot impose upon them those which they have themselves declined to assume.

2. In this case the parties have made their contract in writing, and have absolutely stipulated for the return of the vessel, without allowance for contingencies through which an actual return might become impossible; and the appellants have expressly assumed the risk of such contingencies.

3. The chief reliance of the appellant in support of this contention is the case of *Young vs. Leary*, 135 N. Y., 569, which is supposed by appellant's counsel to be inconsistent with the judgments of the Courts below; but it is not. In that case the engagement of the charterer was held to be only to do what the law implies. In this case the charterer has expressly as-

sumed a liability which is not implied by the law when it is not expressed by the parties.

The general rule for which the appellant contends is expressed by PECKHAM, J., in the case cited, in the following terms:

"The contract in this case comes, as it seems to us, under another class, which relates to the hiring for use of the thing hired, and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. Even in such case of express contract there is implied a condition of the continued existence of the thing which is the subject of the contract, and, if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused" (p. 576).

But the Court expressly affirm the competency of the parties to make a different contract if they wish to do so. "There is no question," they say, "that a party can, if he so please, bind himself to deliver, notwithstanding the thing may perish which he contracts to deliver" (p. 577).

The precise point decided in *Young vs. Leary* was that the guarantor of the hirer under a charter without covenants for repairs, but with a covenant for delivery at the termination of the charter in the same good condition as the ship was in at the beginning, was not liable for the accidental destruction of the ship by fire, *without fault on the part of the charterer, three months after the charter expired*—not during the charter term—and while the ship was in the charterer's hands under circumstances that amounted to an extension or waiver of the stipulation fixing the time for delivery.

The charter was for one year from October 17, 1884. The vessel was burned at sea in January, 1886. By the charter the charterer covenanted to insure for one year. That was done; and the insurance expired by its own limitation, concurrently with the charter term. The charterer was under no obligation to renew it.

The charterer further stipulated to assume all risks of damage that may happen to the vessel and all liability of every kind and nature for which the vessel or its owners may be responsible *during the term of the charter* which were not covered by insurance. That covenant was held to be limited by its terms to the period of the charter party (p. 574–5). When that period had expired the only liability remaining on the charterer was that imposed by the covenant to deliver the vessel; but as performance at the time was waived by the owner, the measure of the charterer's subsequent liability was fixed by the obligation which rested upon him after the charter period expired, whether imposed by law from the relation of the parties, or, in contemplation of law, adopted by the parties from the covenant in the charter. In either case the obligation was the same, for the express covenant to return the ship was precisely the obligation which the contract of hiring implied: neither more nor less. The Court held that the destruction of the ship under these circumstances, *without his fault*, was a sufficient answer to an action against the guarantor for breach of the covenant, express or implied, to deliver the ship.

In short, in *Young vs. Leary*, the charterer's assumption of risk of loss and damage was restricted to the term of the charter; the loss occurred after the term had expired, and was not covered by the covenant. Consequently the charterer was held not liable.

In reading the opinion of the Court it will be remarked that the argument in regard to the liability of a lessee of real estate under covenants either simply to deliver up at the end of the term, or to repair or keep in repair and deliver up at the end of the term, are treated as applicable to the liability of the charterer of a ship under a charter containing similar covenants, and there can be no doubt that to this extent the argument in the one class of cases is applicable to the other class.

The Court say: "This obligation is subject to the implied condition that the building shall be in existence at the end of the term, and, if before that time it was burned down without the default of the tenant, he is held not liable under his contract," citing authorities (p. 578); and immediately the limitation of this principle is stated in the following language: "It is otherwise if the lessee has covenanted to repair or rebuild *(McIntosh vs. Lown*, 49 Barb., 550, 555; *Phillips vs. Stevens*, 16 Mass., 238*)*."

4. In *Ames vs. Belden*, 17 Barb., 513, the obligation of a charterer to return the vessel at the end of the charter term is discussed at large, and is stated in similar terms to those employed in *Young vs. Leary*. In that case also the competency of the parties to enlarge the liability of the hirer implied by the law from the hiring is recognized, and is illustrated by arguments deduced from the liability of lessees of real estate. After stating the rule, the Court say: "It cannot be doubted, whatever may be the law with reference to common carriers, but that a bailee may enlarge or vary his common-law liability by special agreement; that he may become an insurer of the safety and redelivery of the property, and that, if he does so, he cannot plead in excuse for performance of his undertaking, a disability arising from the act of God (6 Mass., 63; 16 *Id.*, 238). Such a defense would involve the absurdity in a case like this of alleging a calamity apprehended by the parties and against the consequences of which the bailee expressly indemnified the bailor. The class of cases where such a defense is admisible is when the duty or obligation is merely *implied by law*, as the obligation to return the property when the purposes of the bailment are fulfilled. The act of God cannot be pleaded in excuse for the performance of an express covenant when compensation in damages may be awarded (7 Mass., 325; 16 *Id.*, 238; 2 Saunders, 422, note 2; 6 T. R., 759; 12 Wend., 589; 8 Cowen, 298)" *(Ib.*, 515*)*.

IV. The stipulations of the charter in suit are precisely such as in the case of a lease of real estate impose upon the lessee an obligation to rebuild, if the buildings be accidently destroyed during the term without fault of the lessee, and under which the lessee is held in damages for non-performance.

Walton vs. Waterhouse, 2 Saund., 420, and notes.
Bullock vs. Dommitt, 6 T. R., 650.
Brecknock Co. vs. Pritchard, *Ib.*, 750.
Warner vs. Hitchins, 5 Barb., 666.

1. In *Warner vs. Hitchins, supra*, the effect of the covenant to repair is discussed at large, and with much learning, and all the leading authorities on the liability of a tenant in respect to rebuilding are cited and commented on. The question at issue was whether under a covenant on the part of the lessees to surrender up possession of the premises at the expiration of the lease in the same condition they are in at the date of the lease, natural wear and tear excepted, but without express covenant to repair or rebuild, the tenants were bound to put up new buildings in the place of those accidentally destroyed by fire during the continuance of the term. The Court held, upon the principle already stated, that they were not; but in the course of the discussion some of the qualifications of the rule were considered. The Court said, among other things: "It is now, however, settled that when the lease contains on the part of the lessee an express covenant to uphold and repair the premises he is liable to make good such losses, but in all the adjudicated cases where this liability has been held to attach to the lessee he has entered into an express covenant to repair" (p. 668). "The stipulation to repair is the proper one where the lessee assumes to keep and make the premises good from whatever cause the injury may arise, whether from unavoidable accident or negligence" (*Id.*, p. 670). Again: "The covenant to

repair has been in use for centuries. Its appropriate office and design is understood not only by lawyers but laymen, and its omission is a strong reason for supposing that neither party intended by other provisions to assume or impose the obligations which it creates. The covenant to repair has always been regarded as imposing a more extended liability than the covenant to surrender the premises in as good condition as found. And the insertion of the latter covenant has never been considered as superseding the necessity of the former when the intention is to charge the tenant with repairs, even those not made necessary by casualty" (p. 673). Once more, after citing and commenting upon numerous cases, the Court add: "The question in all these cases is how far the parties intended the covenant to extend; and, where it has been incautiously said by Courts that the law will excuse non-performance when by the act of God performance has become impossible, the real defense has been that the parties did not by their contract intend to provide against such losses, and hence the agreement was not broken. Courts may be less inclined to hold that providential losses were within the intent of the parties than those arising from other causes, but when the intent is ascertained the principle of law applicable in either case is the same" (p. 678).

2. Such being the effect of the covenant in this charter to keep in repair, its meaning is certainly carried beyond the possibility of doubtfulness by the hirer's further covenant to be liable for any and all loss and damage to the vessel. This being so, the principle of *Harmony vs. Bingham*, 12 N. Y., 99, and other cases of that character cited above, applies to the case at bar, leading to the conclusion that when the hirer covenanted in this charter to surrender the yacht at the expiration of the term he meant to assume the liability of an insurer against all kinds of accident or loss; that he meant his covenant to be absolute and to comprehend all contingencies that might happen;

that he intended to and did indemnify the owner against such accident as that which occurred to the vessel on the 5th of September. Having made these covenants, he is bound to respond in damages for their breach.

3. The sufficiency of the language of the charter to constitute a covenant to repair is beyond question. The single word 'repair' obliges the party charged to make good all injuries, even to the complete rebuilding of the subject of the agreement, with the alternative of payment of its value, in the event of total destruction.

Beach vs. Crain, 2 N. Y., 86.
Compton vs. Allen, Style, 162.

4. There is no force in the suggestion that the covenants in the charter in suit to repair and to return the vessel ought to be interpreted as if they were one covenant *so* to repair *as* to return the vessel in as good condition as at the start. The covenants in this charter are not so expressed. They are separated from each other by other stipulations. There are, in short, two distinct covenants, and not one.

5. In some of the cases cited reference has been made to the liability of the insurer which a [illegible]e is not understood to assume unless by his express agreement. In the case at bar he has assumed precisely that kind of liability. He covenants that he will "procure security or guaranty to and for the owner in the sum of seventy-five thousand dollars, to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract" (p. 16).

If the charterer had not procured insurance he would clearly have been liable under this covenant for such damages as the owner might have recovered against an insurer.

Jacksonville, &c., Ry. Co. vs. Hooper, 160 U. S., 514.

In *Young vs. Leary, supra*, the charterer was relieved from liability because he did procure the insurance in conformity with his covenant.

In the case at bar, instead of procuring insurance from a third party, the charterer expressly assumed this liability upon himself, and in this respect the case stands as the *Jacksonville Railway* case stood and as the *Leary* case would have stood if no insurance had had been obtained

V. In the Circuit Court of Appeals it was suggested for the first time by the appellant that the breach charged in the libel is only a breach of the covenant to deliver, and that no breach of the covenant to keep in repair is specifically alleged. The answer to this suggestion is that sufficient allegation of breach of the covenant to repair is made out by the charge (p. 5) that the yacht "while in the charge and control of said respondent, its agents or servants as aforesaid, was wrecked and is a total loss"; and respondent admits this allegation *in totidem verbis* (p. 12.).

The allegation of negligence, added to the libel by amendment, is found in the record (p. 21).

On the trial the facts established constitute a breach of the agreement to keep in repair, no less than the covenant to deliver at the end of the charter period. It would therefore have been competent, had the attention of the District Court been called to the point, to have amended the libel by alleging more specifically a breach of the covenant to keep in repair; and, should the Court deem it necessary, it is asked that such amendment be allowed instanter, or opportunity be given for leave to move to amend.

The Charles Morgan, 115 U. S. 69.

Such amendment would merely conform the pleadings to facts proved without objection, and would, in that view, be formal rather than substantial.

The J. E. Trudeau, 54 Fed. R. 907, 912; 4 C. C. A. 657.

SECOND. Independently of the covenants of the charter, the appellant is liable for the destruction of the vessel because it resulted from negligent navigation.

I. Leaving out of view for the moment the covenant in the charter here in suit to keep in repair, and the covenant by which the charterer assumes all liability for loss and injury, there remains the covenant to deliver the yacht at the end of the charter period. She is not delivered. The charterer being sued for breach of the covenant alleges that at the end of the charter period she was no longer in existence. Whether the burden of proof to show that her destruction was due to the charterer's negligence lie upon the owner or the charterer—a question which the Court expressly declined to discuss in the *Leary case*, because the case had been tried without reference to that question (p. 583)—when negligence is established as the proximate cause of the loss of the vessel, the charterer is clearly precluded from setting up her loss as an excuse for noncompliance with his agreement to restore her. He would nowhere be permitted thus to raise a defence out of his own default. In the *Leary* case, speaking of the waiver of punctual delivery pending negotiations for sale, the Court said: "If there were such waiver and extension of the time, a destruction of the vessel in the meantime *without the fault of McKay* would be a destruction before any breach of the contract on his part had occurred and in such case he would not be liable." If therefore in the case at bar the proofs demonstrate that the *Kanapaha* was wrecked through the negligence of her master, this is no excuse for the appellant's breach of its engagement to deliver the vessel at the end of the charter period.

In fact, if there were no covenant at all for the return of the vessel, the hirer would still be liable for her destruction through his own negligence.

Authority would seem to be superfluous upon this point, yet analagous cases are not wanting. Where the lessee covenanted that the buildings he should

erect should at the expiration of the term revert to the lessor, "without damages of any kind except the natural wear of the same," the buildings so erected were destroyed by fire due to the negligence of a stranger. It was held that the negligence of the stranger was imputable to the lessee, and therefore constituted no defence.

Cook vs Champlain Transportation Co.
1 Denio 91.

In another case the lessee covenanted to repair, "damages by the elements or acts of Providence excepted." The house was injured by a flood proceeding from a reservoir which the negligence of a stranger had weakened, and consequently the water escaped. It was held that the damage to the house was not due to inevitable casualty but to negligence, and therefore afforded no defence.

Polack vs Pioche 35 Cal. 416.

II. The interpretation of the covenant to keep in repair is in no way affected by the *Leary* case, because there was no such covenant in the charter there, and also because the charterer's assumption of liability for risks not covered by insurance was limited to a period which had expired when the loss took place.

III. The evidence clearly proves the negligence.

1. The sea was smooth, the night clear, the yacht had been sailing all day in sight of land, the reef and the current are well known to mariners and are indicated on charts and Sailing Directions, the captain was familiar with the coast, the harbor lights which the captain expected to make at sunset had not been sighted an hour and more later: when suddenly the vessel ran on the reef, and was found to be four miles nearer the shore than the captain supposed her to be.

Statement of Facts, *supra*.

2. This situation is *prima facie* proof of negligent navigation.

The Webb, 14 Wall.' 406.
Booker v. Smith, 40 F. R., 839.

IV. The captain gives three reasons to rebut the presumption of negligence and to account for the accident on grounds which he pretends would relieve him of responsibility: first, an unknown current; second, the absence of light in the lighthouse; third, an imperfect chart of the coast.

Test. Atkinson, pp. 100, 101.

Neither of these excuses is valid.

1. The current is not unknown, but is well known to navigators and is described in the Sailing Directions issued by the United States Hydrographic Office.

Test. Knight, pp. 190, 191.
Sailing Directions, pp. 205, 206.

The current being well known, the master is chargeable with knowledge of it.

The Webb, 14 Wall, 406.
The Nicanor, 44 F. R. 504.

In view of his long experience in navigating the waters off the north coast of Cuba (pp. 103, 112) either his assertion that he did not know of this current (p. 101) is untrue, or else his ignorance of it is inexcusable.

2. The lights had been extinguished during the war, as the captain well knew (pp. 102–3, 197, 198). The captain said he had been told at Ponce that the lights on the coast had been relit and were burning (pp. 101–2). The lights at Nuevitas harbor had in point of fact been broken and were not yet repaired.

Be this as it may, the fact that he did not make the light for an hour after he had expected to see it showed either that the light was not lit or that he was out of his course. In either case it was his duty to keep off

shore so as to avoid the reefs which he knew skirted the coast.

The Montana, 17 F. R. 377.
The City of Para, 44 F. R. 689.

3. It is true that the United States chart is imperfect; but the reef is correctly shown on the British Admiralty charts,—with which the captain was acquainted, as shown by his reference to them (p. 127).—is correctly described in the United States Sailing Directions, and is generally known to mariners.

Test. Knight, p. 188, 189, 190.
Sailing Directions, p. 197.

Under these circumstances the master is chargeable with knowledge of the reef.

The Mascot, 48 F. R. 917; 57 F. R. 512.

4. The stranding was really caused by the captain's negligence in not allowing for the landward set of the current. He supposed himself to be six miles off shore at dark, and then laid a straight course to pass Nuevitas East Point light six miles to seaward. In running twelve miles in one hour, he deviated four miles from the course he intended to take. This is negligence.

The Webb, 14 Wall. 406.

5. The fact that the reef at the place of stranding was not shown on his charts is of no importance, because he had laid his course, as he supposed, to carry him four miles outside the position of the reef, and if his course had been correct he would not have struck it at all. In other words, he had not laid a course to carry him on the reef, in the expectation of finding deep water where the reef was, relying upon a defective chart; and so the stranding did not result from a mistake in the chart: it resulted from his being borne by the current, without his knowledge, out of the course he had laid and supposed himself to be sailing.

6. The failure of the master to take bearings, or to take any observation of the shore, especially at sunset, so as to correct his estimate of his distance from the shore, when he knew he was on a dangerous coast, was negligence.

Bazin v Steamship Co. 3 Wall. Jr. 229
The City of Para, 44 F. R. 689
Union Ins. Co. v Dexter, 52 F. R. 152.

Third Point.

The Circuit Court of Appeals were right in taking as the measure of damages the value of the vessel stipulated in the charter.

I. Counsel for the appellant assert in their brief (p. 3) that "it can be shown that her original cost at Cramps was $59,000, and that she was sold four years later for $50,000." The same assertion as to her cost is repeated elsewhere.

What this assertion is founded on does not appear. It is not founded upon anything in the record, for there is no such evidence there. It is not in accordance with the facts as understood by the appellee. He bought the yacht some four years before the charters in suit, and used her very little. She cost him, not $50,000, but $75,000. He was never able to learn what the builders received for her, though he endeavored to ascertain; but he was informed during the negotiations for her purchase that her builders had said they would not take a contract to duplicate her for $200,000. He refused an offer of $90,000 while she was in commission before the Spanish War broke out.

These assertions, on one side or the other, are not facts of the case contained in the record; but the ap-

pellant is not warranted in the statements made by its counsel, either by the record or by the facts.

II. The argument for the appellant is taken up largely with an effort to show that the sum of $75,000 mentioned in the agreement of suretyship is not liquidated damages, but a penalty.

There is no such question in the case. Neither of the courts below have assumed or decided that this sum is liquidated damages.

This sum is used in the contracts for two purposes: First, to ascertain the value of the vessel; second, to limit the liability of the charterers in case of breach of covenant. Incidentally, it furnishes the measure of damages in case of the total loss of the vessel, but that is because it is her value; not because the charterers expressly agreed to pay that sum in case they should fail to return her at the end of the charter period; what they should pay is determined by the law on the basis of her value.

III. The measure of damages in case of total loss is clearly the value of the ship.

1 Sedgw. Dam., §§ 242-3.

IV. The value of the ship was ascertained and stipulated by the parties in the charter.

1. The charter provides: "For the purposes of this charter the value of the yacht shall be considered and taken at the sum of $75,000; and the Hirer shall procure security or guarantee to and for the owner in the sum of $75,000 to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract" (p. 16).

2. The object of this clause was to fix the value of the yacht. The reason why it was so fixed by the parties instead of being left to be ascertained, in case

of need, by the courts, is sufficiently apparent from a remark made by Capt. Atkinson. He said, "A yacht has no commercial value—no market value. * * * The value of a yacht is a fancy value. * * * A yacht has no value except a fancy valuation (p. 110).

3. Where the parties themselves fix values, as of ships, buildings, cargoes, merchandise, or other articles, their agreement is, in the absence of fraud, conclusive upon them.

Marine Ins. Co v Hodgson, 6 Cr. 206.
Pleasants vs. Maryland Ins. Co., 8 Cr., 56.
Kane vs. Commercial Ins. Co., 8 Johns., 229.
Whitney v American Ins. Co, 3 Cow. 210.
P. & S. Steamship Co v Phoenix Ins. Co. 89 N. Y. 559, 564-5.
Hart v Pennsylvania R. Co., 112 U. S. 331.
Zimmer v N. Y. C. & H. R. R. Co., 137 N. Y. 460.
Graves v Lake Shore R. R. Co., 137 Mass., 33.
Coupland v Housatonic R. R. Co. 61 Conn., 531, 545.

The agreement as to value is conclusive even though the goods have a market value.

V. The principle is well recognized in maritime law, and is constantly observed in ascertaining the value of ships, for various purposes and under various circumstances. A few illustrations show the extent and variety of its application.

A ship was insured for £6,000 under a policy in which her value was stipulated at £6,000. She was sunk by collision and the insurer paid the insurance in full and afterwards brought an action in the name of the owners against the vessel in fault and recovered £5,500 damages. The owners insured claimed to participate in the recovery on the ground that the real value of the vessel was £9,000, upon the theory that the value stipulated in the policy constituted an es-

toppel as between insurer and insured only in an action to recover the insurance. This contention was overruled, and the court held that in an action between insurers and insured involving the value of a vessel covered by valued policy, and based upon the policy, the value fixed in the policy is conclusive.

North of England Ins. Assn. vs Armstrong
L. R. 5 Q. B. 244

In the case of a constructive total loss, while the right to abandon is to be determined with reference to the actual value of the ship when repaired in comparison with the cost of repairing, which may differ widely from the stipulated value, yet the total loss having been thus ascertained the value at the time of loss is conclusively fixed by the policy.

Irving v Manning, 6 C. B. (H. of L.) 391.

So, again, though the ship be shown to have deteriorated greatly when the loss occurred, the stipulated value still controls.

Shaw v Felton, 2 East 108

The question of valuation is discussed at length by Mr. Arnould, with the conclusion that the object of a valuation is to fix an estimate of the subject insured, and to supersede the necessity of proving the actual value by specifying a certain sum as the actual value ; that the rule applies whether the actual value be greater or less than the agreed value ; and that only fraud will vitiate the agreed valuation, upon the ground that the fraud vitiates the whole contract.

1 Arnould Marine Ins. (6th Ed) 300-302.

He says, among other things :

"From the difficulty of proving the insurable value of the ship in case of loss, almost all policies on ship are valued : the principle upon which the value is generally calculated in this country is, to estimate *the ship's worth to her owner at the outset of the risk*, in-

cluding stores, outfit and money advanced for seamen's wages, taking care to cover the whole with premiums and commissions.

"However much the ship may be damaged by wear and tear, and consumption of her stores and provisions at the time of loss, even though the loss takes place at the very termination of a long voyage, yet the valuation calculated on the above principle is the sum which the assured will be entitled to recover (if they have insured up to the amount of the valuation) in cases of total loss; and in cases of partial loss it will equally regulate the amount of average payable by the underwriter."

The learned author's proposition that the valuation may be vitiated by fraud on the ground that such fraud would vitiate the whole contract, might suggest a question, which cannot, however, arise in the case at bar. Upon familiar principles, if a bailee fail to return the object bailed in accordance with the terms of his contract, the bailor may either sue on the contract as for a breach in *assumpsit*, or, in a proper case, in covenant, or even, if a penalty be provided, in debt; or else he may elect to treat the bailee's fault, if such there be, as conversion, and waving the contract, sue in tort. If he adopt the latter course the question might arise whether the value stipulated in the contract should be deemed conclusive in an action, not brought upon the contract, but in avoidance of it.

Stevens v Low, 2 Hill 132.

That question does not arise in this case, for the libellant here is not suing as in tort, for conversion, but as in *assumpsit* for breach of contract. The language of the charter in suit is that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars." It matters not, therefore, which of the covenants be the subject of the breach. Whenever an action is predicated upon the breach of any provision the stipulated valuation remains controlling.

VI. The question of over valuation does not arise in in this case, because it is not pleaded in the answer.

McKinlay vs. Morrish, 21 How, 343.
The Bertha, 36 C. C. A., 509, Conkling's Adm., 594.

VII. The stipulated valuation of the vessel at $75,000 is neither a penalty nor liquidated damages.

1. The distinction between the valuation of the thing which is the subject of a contract and an agreement upon the amount of damages to be paid on breach of the agreement is perfectly clear. So the agreed value of time or service, or goods sold and delivered, is entirely distinct from an agreed sum to be paid for breach of a contract to hire, or to serve, or pay for goods. The Courts have never refused to enforce the agreement of parties putting a value on the subject matter of a contract where there is no charge or proof of fraud.

See cases *supra*.

The same distinction is illustrated in cases where the Courts permit a witness to state the value of a thing injured as of a time both before and after the injury, but refuse to permit him to testify as to the amount of the loss sustained by the owner by reason of such injury.

Van Deusen vs. Young, 29 N. Y., 9, 36.
Roberts vs. N. Y. El. R. R. Co., 128 N. Y., 455.

4. There could be no good objection to enforcing the stipulation even if it were in strictness a covenant for the payment of liquidated damages.

(a) In late cases the rule is expressed that damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement was made are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and

the amount fixed is not on the face of the contract out of all proportion to the probable loss.

Curtis v Van Bergh, 161 N. Y. 47.
Ward v H. R. Building Co. 125 N. Y. 230.

(b) In the case at bar the element of uncertainty has already been mentioned.

(c) As to the reasonableness of the valuation, it appears that the hire was $2500 a month, so that the value was estimated on the basis of two and a half years' hire: surely a moderate rate. In proportion to the demurrage, $500 a day—which is clearly liquidated damages—the valuation is still more conservative.

(5) The appellant is mistaken in supposing that the evidence tends to show the actual value of the *Kanapaha* was $30,000.

The only testimony on which the appellant relies to sustain this position is that of Captain Atkinson, the master of the yacht in the employ of the appellant, through whose unexcused negligence the wreck occurred. His testimony, given without opportunity to the owners' counsel to cross-examine as to his competency, is as follows:

Q. What was the fair value of the yacht "Kanapaha" in the summer of 1898 and at the time of the accident, that is, prior to the accident?

A. I would preface my answer by first stating that a yacht has no commercial value. You will understand that—

Q. You mean no market value?

A. No market value.

The Witness: The value of the yacht is a fancy value. According to my best belief, I said in my statement in New Orleans that I valued the yacht at $50,000, but if I was put on my oath, and she was at her dock and was put up at auction, that she wouldn't realize $30,000—between $30,000 and $40,000. The reason I stated $50,000 was that I wanted to give what

I considered a fair value of the yacht. As I said before, a yacht has no value excepting a fancy valuation.

Q. Capt. Atkinson, what, in your opinion, would the yacht "Kanapaha" have sold for in September, 1898, or at any time in the summer of 1898 prior to the accident, if offered for sale in New York?

A. My opinion is that she would not realize $30,000.

Record, pp. 110, 111.

The witness lays stress on three points in this testimony: *first*, that a yacht has no market value; its value is a matter of fancy; *second*, that her fair value, according to the canons of his own fancy, was $50,000; *third*, that if forced to sale at auction she would not bring the value his own fancy set upon her, and not more than $30,000.

Now, it is obvious that if it be competent for Captain Atkinson to value her by the standard of his fancy, it is competent for her owner and her charterer to value her by the standards of their fancy; and this is what they did. The witness concedes that the standard adopted was the only standard that could be applied, and though he differ from the parties to the charter in his conclusions, this only shows the difficulty of arriving at the fact, and justifies the wisdom and foresight of the parties in settling it by agreement.

(6) The case of "The Conqueror" in this court (166 U. S. 127), cited by the appellant, contains nothing opposed to the judgment appealed from in this case, but on the contrary suggests a principle which, if applied here, shows the agreed valuation to have been entirely reasonable. That principle is that there is a reasonable relation between the hire of a yacht and her value, insomuch that if you know one you can reason more or less correctly to the other. In that case the yacht cost $75,000. The Court below awarded to the owner $15,000 as the value of her use for five months, at the rate of $3,000 a month. This court

protested that their credulity was quite unable to bear the strain of the proposition that her use was worth the amount awarded (p. 134), and held the testimony insufficient to support the award. In this case there is no complaint that the monthly hire was excessive. It is, therefore, a fair basis from which to reason to her value. Had it been $3,000 a month instead of $2,500 this Court, on the authority of "The Conqueror," might well have repudiated the suggestion that her value could be taken at so low a figure as $75,000; but, taking the value of the use at $2,500 a month, it can hardly be questioned that the parties in their agreement fixed the value at as low a rate as this Court would deem within the limits of reasonableness.

Fourth Point.

The Circuit Court of Appeals correctly held, overruling the District Court to the contrary, that the $10,000 paid by the charterer for the hire of the yacht was not to be deducted from her value in measuring the owner's damages upon breach of the hirer's stipulations for her safe return.

I. If the value of the vessel is the measure of damages, and if her value was fixed by stipulation at $75,000, it would seem that the appellant is bound to show a very clear agreement as the basis for any other rule of damages.

II. The District Court relied on the Third clause of the so-called agreement of suretyship. It reads thus: "Third, that our liability hereunto shall in no case exceed the sum of $75,000" (p. 17). It does not warrant the conclusion reached by the District Court.

The true construction of this provision must be ascertained in the light of the principle that as the guar-

antor is only liable in respect of covenants broken by his principal, and not of covenants performed, no money paid out by the principal in respect of covenants performed avails either party in abatement of his liability in respect of covenants broken by the principal.

III. The charter money having been paid by the principal the covenant to pay it was performed, and not broken, and no liability ever attached, as for breach of it, either under the charter or under the guaranty.

1. The charter money, $10,000. for the four months was expressed to be payable on the signing of the charter (p. 15).

It appears to have been so paid, for the check is dated on that day.

It is not claimed that the charter was delivered before the money was paid in accordance with its terms.

Consequently when the charter was delivered there was no liability for that $10,000.

2. The agreement in the charter to procure security seems to be framed on the theory that the $10,000. is no longer a liability, because the amount of the security to be furnished is exactly the stipulated value of the vessel. It was not necessary that the hire should be included in the security, because the owner had the security in his own hands; he need not, and did not, delivert he charter or the vessel until it was paid. This security could not have been intended to cover the breach of a condition which had been performed before the charter became operative by delivery, and therefore could never be broken.

3. If the District Court were right, it would seem that while the parties fixed the value of the ship by their agreement, knowing—as they are presumed to know—that the value is the measure of damages, they made this agreement intending that the charterer should not be liable for the full value, but for $10,000 less than the value.

Had they meant anything so unusual the charterer should have taken care to express it distinctly, because this covenant is construed most strongly against him, in the sense in which the owner is taken to have understood it, on the principle that if the construction be doubtful, that one of the two must be adopted which makes the covenant most beneficial to the promisee, and this is the construction for which the libellant now contends.

Marvin vs. Cone, 2 Cow., 781, 806.

4. The fact that the charterer insured its own risk for $60,000, as stated by the District Court (p. 267)—it was really £12,000, or $58,500 (pp. 225-6)—is not significant, because if this sum did not cover a risk of $75,000, it also did not cover a risk of $65,000.

Fifth Point.

The exceptions taken by the appellant to rulings of the District Court upon questions of evidence are untenable.

I. The first exception challenges the admission in evidence of the check for $5,000 given by the appellant in payment of the hire of the yacht under the first charter party, and the admission of the receipt for $1,476.64 for payment of insurance premiums under the first charter. The $5,000 check, Exhibit 6, and the record of its admission are found at pages 44, 45 to 253, and the receipt for insurance premiums, Exhibit 8 (p. 225) was admitted at page 52.

Both the check and the receipt were competent to show that the charter money in the one case and the insurance premiums in the other were paid by the *Sun*, and as evidence of Lord's authority and of the ratifica-

tion by the Company of his act in executing the first charter, and his authority, or the ratification of his act in respect to that, is evidence tending to show authority to make the second charter between the same parties.

They are evidence for the further purpose of showing that the vessel was in the service of the *Sun* under an earlier charter at the time when the charter in suit was executed by the same agent.

II. The second and third exceptions relate to the admission in evidence of statements published in the *Sun* newspaper May 3, 1898 and September 11, 1898 (pp. 70, 71). These extracts were properly received as admissions on the part of the appellant that the vessel was in its service.

Admissions in a newspaper are competent evidence against the proprietor.

Frye vs Bennett, 4 Duer 247, 254: 28 N. Y. 324–330.

Malloy vs. Bennett, 15 Fed. Rep. 371, 374.

If Mr. Dana, as he admits, took the statements he read in the paper as evidence that the *Kanapaha* was employed by the *Sun* (p. 232), the appellant cannot reasonably object to their sufficiency for the information of the Court.

III. The fourth exception relates to the admission of Macdaniel's letter to Chubb, Exhibit 14 (pp. 259, 148).

In connection with the proof that insurance was effected and paid for by the appellant, this letter is admissible as *res gestæ*.

IV. The fifth exception is directed to the admission of a conversation between Albert Lee, Editor of *Harper's Round Table*, and Mr. Lord (p. 115).

The testimony was admissible as *res gestæ*.

The evidence is, at all events, of no importance; for

the fact that money was received from Harper Brothers by the *Sun* for the conveniences afforded to reporters was otherwise proved without objection (Test. Macdaniel, p. 59).

V. The sixth exception relates to the question addressed to Bradley, the Notary Public who took Lord's acknowledgment to the agreement of suretyship of May 14 (pp. 125–6). He was asked if he knew whether the words "*for the Sun Printing and Publishing Association*", part of the signature, were there at the time the acknowledgment was taken, and he answered he did not. He was then asked "Q. You will not say they were not?" This question was objected to and admitted over the respondent's exception, and the witness answered "No, I will not say they were not."

The question was manifestly competent, but the testimony was afterwards rendered unimportant by the appellant's admission that the whole signature including the words in question was written by Lord (p. 201)

VI. The seventh exception challenges the following question put to the witness Knight: "Q. Can you state from your experience of those harbors whether that reef is a well-known reef?" (referring to the reef upon which the *Kanapaha* was wrecked (p. 189).

The question was proper as bearing upon the supposed negligence of the master of the yacht. If the reef was well known, he is chargeable with knowledge of it, and was negligent if he did not lay his course so as to keep out of the way of it. Whether or not the reef is well known is a question of fact, and the witness was shown by his experience in navigating those waters to be competent to answer it.

VII. The eighth exception calls in question Knight's explanation of the way to ascertain the distance of a ship off shore (fols. 1015, 1016).

The testimony of the master had shown that he had not used any means to ascertain the distance of his vessel from the shore beyond taking his latitude at noon (pp. 127–28). It was competent to show that he might have taken the distance and how it could have been done, in order to prove that he was not exercising suitable care and skill in navigating the ship.

VIII. The ninth and tenth exceptions relate to questions addressed to Knight (pp. 194–5) enquiring whether, under the circumstances mentioned, it would be possible to ascertain, up to sunset, the true position of the steamer, and whether a current was setting in towards the shore.

These questions call for statements of fact which the witness's experience rendered him competent to testify to.

IX. The eleventh exception is addressed to a question put to Knight (p. 195) as follows: "Q. Suppose you were taking a northwesterly course along the north coast of Cuba, bound for the old Bahama Channel and expecting to see Maternillos light off Nuevitas harbor about the time it became dark, and you were at sunset about 18 miles east of Nuevitas harbor. Failing to see the light at dark, what would you do?"

It was objected to on the specific grounds that it assumes facts not proven, and that it is hypothetical and calls for a conclusion of the witness.

The facts had been proved by the testimony of Atkinson (pp. 100, 129–30). The captain had testified further that the sun set from six to half-past (p. 122), that the yacht was making about 12 knots (p. 120), and that she stranded about 7 miles east of Nuevitas harbor (p. 99); which makes the distance assumed in the question.

It was competent to ascertain by inquiry of an experienced sea captain what good seamanship would require to be done under such circumstances.

Transportation Line vs. Hope, 95 U. S. 297.

Union Ins. Co. vs. Smith, 124 U. S. 405, 420–3.
Walsh vs. Washington Ins. Co., 32 N. Y., 427, 443.

No objection was made to the form of the question.

X. The twelfth and thirteenth exceptions challenge the propriety of admitting in evidence pages 122 and 123, and page 5, of the sailing directions issued by the United States Hydrographic Office with reference to the Caribbean Sea and the Gulf of Mexico and adjacent waters (pp. 204, 205, 197).

This is an official publication issued by the Navy Department pursuant to U. S. R. S. §§ 431, 432 for the information and guidance of mariners; and the extracts read in evidence are competent, as maps or other publications would be, for the purpose of showing the position of the reef and of the current, and of charging the master of the vessel with notice of both.

Evanston vs. Gunn, 99 U. S., 660.

XI. The fourteenth exception is directed to a question put to the witness Jungen (p. 208) asking him to explain a paper pasted in the inside of the cover of the Sailing directions. The objection was that the question was incompetent, improper and as calling for an explanation as to the contents of a paper which speaks for itself (p. 273). The witness explained that the paper was pasted in the book to show the date of issue and also for the owner of the book to enter on the receipt the number of notices to mariners of corrections to be made in the book, and to indicate to him whether he had made the correction on his own chart to conform to the notice.

The question and answer appear to be perfectly harmless and not in any way prejudicial to the respondent. The notice on the paper seems to be intended to ask persons using the book from time to time to make corrections to conform with later information.

XII. The fifteenth exception assumes that the appellant offered, and was denied an opportunity, to prove that the yacht had been grossly over-valued in the charter party (p. 274). No such offer was made during the trial, nor does any suggestion of over-valuation appear in the record. Moreover, there is no allegation in the answer of over-valuation; and in the absence thereof appellant was not entitled to offer evidence on that point.

McKinlay vs. Morrish, 21 How., 343.

XIII. The twenty-second exception relates in part to the allowance of interest by the District Court from the time of the breach of the charter party, viz. October 1st, 1898. Libellant is entitled to interest from that date.

Winch vs. Ice Co., 86 N. Y., 618, 620.
Little vs. Banks, 85 N. Y., 258, 267.

XIV. The rest of the appellant's exceptions relate to the question of damages (fifteenth to seventeenth, twenty-third to twenty-ninth) and to the question of its liability under the charter (eighteenth to twenty-first, thirtieth); and these subjects have already been discussed in the preceding points.

Sixth Point.

The decree of the Circuit Court of Appeals should be affirmed, with costs.

GEORGE ZABRISKIE,
J. ARCHIBALD MURRAY,
Of Counsel for Appellee.

Supreme Court of the United States.

No. 49.—October Term, 1901.

The Sun Printing and Publishing Association, Petitioner, *vs.* William L. Moore. | On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 13, 1902.]

The yacht Kanapaha, the property of the respondent Moore, was let on April 1, 1898, for the term of two months, by a charter party, in which Chester S. Lord was recited to be the hirer, but which was signed by him as follows: "Chester S. Lord, for The Sun Printing and Publishing Association." At the time Mr. Lord was, and for many years prior thereto had been, the managing editor of The Sun newspaper, and had special charge of the collection of news for The Sun Printing and Publishing Association, the publisher of the newspaper aforesaid. We shall hereafter speak of this corporation as The Sun Association and of the newspaper as The Sun.

In the body of the charter party the hirer agreed to furnish security, and cotemporaneously with the execution of the contract a paper was signed, which is described in the body thereof as the "understanding or agreement of suretyship" required by the charter party. This paper recited on its face that it was made by "The Sun Printing and Publishing Association," and it also was signed by Lord exactly as he had signed the charter party. Before the time fixed in the charter party had expired, that is to say, about the middle of May, 1898, a second charter party and a second agreement of suretyship were executed. These agreements were substantially identical with the previous ones, except they provided for a new term to begin at the expiration of the previous one and to continue for four months thereafter, that is, up to October 1, 1898.

On the execution of the first papers the yacht was delivered to The Sun Association, was by it immediately manned, equipped and provisioned, and one or more of its reporters were placed on board with authority to direct the movements of the vessel, and she was sent to Cuban waters, to be used as a dispatch boat

for the purpose of gathering news concerning the events connected with the hostilities between the United States and Spain.

Early in September, 1898, the yacht was wrecked and became a total loss. For a breach of an alleged covenant, to return the vessel, asserted to be contained in the charter party, this libel *in personam* was filed against The Sun Association and the damages were averred to be the value of the vessel, which it was alleged was fixed by the charter party at the sum of $75,000. The District Court held that the writings were contracts of The Sun Association through Lord, its authorized agent, and were virtually one agreement; that by them that corporation was responsible for the non-return of the ship, whether or not the vessel had been lost by the fault of its agents or employes, and that there was a liability to pay the value of the vessel as fixed by the charter. Construing the two writings as a whole, this value, it was held, was subject to be diminished by the extent of the charter hire, paid when the charter party was executed. A judgment was entered for the sum of $65,000, with interests and costs. (95 Fed. Rep. 485.) On appeal the Circuit Court of Appeals coincided with the District Court, except it disapproved the conclusion that the value of the vessel should be reduced by the sum of the charter hire. The decree of the District Court was reversed, and the cause remanded with instructions to enter a decree for $75,000, with interest and costs. (101 Fed. Rep. 59.) The case was then brought here by certiorari.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

All the issues involved are to be determined by ascertaining the nature of the writings, the obligations which arose from their execution, and the conduct of the parties in connection therewith. It is essential, then, to bear in mind the exact form of the writings and their text. They are annexed in the margin.*

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*Memorandum of agreement made and entered into this 14th day of May, 1898, by and between William L. Moore of the city of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord of the city of New York, party of the second part, hereinafter called the hirer, witnesseth:

That the said William L. Moore, being the owner of the steam yacht Kanapaha, enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the hirer

It would seem to be necessary on the threshold to ascertain whether there was both a principal contract and an accessory contract of suretyship. The two writings are both signed by Lord in exactly the same character. Judging, by the signatures alone, it is impossible to conceive of two contracts, the one principal and the other accessory thereto, as, in the nature of things, if the first evidenced the obligations of the one who hired and the second manifested the agreement of the same person to fulfill his own duty resulting from the hiring, there could be no accessory contract of suretyship, since both documents but expressed the covenants of the same person relating to one and the same transaction. There is, however, this difference between the two papers. In the body of the first, "Chester S. Lord" is recited to be the hirer, whilst in the body of the second paper it is recited that it is made by The Sun Printing and Publishing Association.

The first question to be determined is, assuming for the present that Lord had authority to bind The Sun Association, Was the

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agrees to hire and hereby does hire the said yacht as she is now for the term of four months from the first day of June, expiring on the first day of October now next ensuing, for the sum of ten thousand dollars ($10,000.00), payable on the signing of this agreement.

That the hirer will carry out the provisions of the charter party made on the first day of April last, and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses, including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues, and any and all other dues and charges, and will surrender said yacht with all its gear, furniture and tackle, at the expiration of this contract, to the owner or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only, and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00), and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00), to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage

first document the individual contract of Lord or that of The Sun Association?

The rule of law to be applied in the determination of this question is thus expressed in *Whitney* v. *Wyman*, (1880) 101 U. S. 392, 395:

"Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. (*Stanton* v. *Camp*, 4 Barb. [N. Y.] 274.)

"In the latter cases the question is always one of intent; and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent, or otherwise.

"The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

Now, while Lord is referred to in the body of the first writing as an individual, he signed the agreement "*for* The Sun Printing and Publishing Association." Clearly this was a disclosure of

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and shall pay demurrage to the owner at the rate of five hundred dollars ($500.00) per day for each and every day's detention.

The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

That the hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
CHESTER S. LORD,
For The Sun Printing and Publishing Association.

Whereas by agreement or charter party dated May 14th, 1898, William L. Moore, of the city of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the city of New York, hereinafter called the hirer, the steam yacht Kanapaha, enrolled in the Atlantic Yacht Club, as will

the principal, and an apt manner of expressing an intent to bind such principal. (*Broadstreet* v. *Baker*, 14 Rhode Island, 546, 549; *Tucker Manufacturing Company* v. *Fairbanks*, 98 Mass. 105.

It results that the first paper or charter party manifested the intent to bind The Sun Association as hirer, if Lord possessed the authority which he assumed to exercise, and consequently that the two papers are in legal effect but one contract, must be interpreted together, and the obligations of the parties arising from them be enforced according to their plain import, seeking always to give effect to the intention of the parties.

It is not denied that Lord was in some respects the agent of the corporation; but it is asserted that he had not the power or authority to make a contract of the character here involved. The charter of The Sun Association provided for no other officers to manage its concerns but a board of trustees. In the by-laws

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more fully and at large appear by a copy of said agreement or charter party hereunto annexed and hereby made part hereof.

Now at the request of the said hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged:

We, The Sun Printing and Publishing Company, of the city of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

First. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

Second. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer, and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

Third. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000.00.)

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

State of New York, }
County of New York, } ss:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of The Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm, under authority of said company, as its act and deed.

[SEAL.]

A. H. BRADLEY,
Notary Public, New York.

provision was made for the election of a president and secretary, whose duties were not prescribed, except as to the signing of certificates of stock and the transferring of stock on the books of the company. An examining committee as also an executive committee were provided for in article VII of the by-laws, as amended June 27, 1893, a copy of which is excerpted in the margin.* The provisions relating to such committees, however, were omitted in the by-laws as amended June 28, 1898.

At the time of the hiring of the Kanapaha, Mr. Paul Dana was the president of The Sun Association, he having been elected to that office on October 26, 1897. Long prior to the last-mentioned date, however, from about 1879, Lord had been the managing editor of The Sun. As such, the evidence establishes, he exercised an unlimited discretionary authority in the collection of news for The Sun, making all pecuniary and other arrangements in respect thereto. Prior to the hiring of the Kanapaha he had, solely on his own volition, hired vessels for the use of The Sun for periods of a week at a time. By whom he was vested with this authority does not appear with certainty, but in the absence of direct evidence we are authorized to presume that the authority was conferred, either directly or indirectly, by the trustees of the association in whom was lodged the power to manage the concerns of the company. *United States* v. *Dandridge*, (1827) 12 Wheat. 64. In the Dandridge case, speaking through Mr. Justice Story, the court said (p. 69):

"By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances."

After illustrating the application of the principle to cases of public duty and many others, it was said (p. 70):

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*The executive committee shall have the supervision of all the property of the association contained in their building, and of the building itself. It shall be their duty to rent such portion of the same as is not required for the use of the association, and to see that all necessary alterations and repairs are faithfully and economically executed; but no expenditure shall be made by the committee exceeding the sum of five hundred dollars unless by authority of the trustees. They shall report their doings to the trustees at each regular meeting.

It shall be the duty of the examining committee to examine the accounts of the association, and to inquire into both the receipts and disbursements of money. They shall report to the trustees at each regular meeting.

"The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty."

See, also, *Jacksonville &c. Railway Company* v. *Hooper*, (1896) 160 U. S. 514, 519, and cases cited.

As said in *Mining Co.* v. *Anglo-California Bank*, (104 U. S. 19,) speaking through Mr. Justice Harlan:

"An agency may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business, and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation."

As, therefore, the trustees of The Sun Association must be presumed to have exercised a supervision over the business of the corporation, they are to be charged with knowledge of the extent of the power usually exerted by its managing editor, and must be held to have acquiesced in the possession by him of such authority, even though they had not expressly delegated it to him.

It being then within the scope of the general authority possessed by Lord to hire the yacht, the contention that in its exercise he must be assumed to have been without right to incur an absolute liability for the return of the vessel or become re-

sponsible for the value thereof, and to stipulate as to such value, is without merit. As Lord was charged with the full control of the busness of collecting news and impliedly vested with power to enter into contracts in respect thereto, he was, in effect, a general officer of the corporation as to such matters, and it is well settled that the president or other general officer of a corporation has power *prima facie* to do any act which the directors or trustees of the corporation could authorize or ratify. (*Oakes* v. *Cattaraugus Water Company*, 143 N. Y. 430, 436, and cases cited.) The burden was on The Sun Association to establish that Lord did not possess the authority he assumed to exercise in executing the contracts. (*Patterson* v. *Robinson*, 116 N. Y. 193, 200, and cases cited.) As the trustees of The Sun Association were unrestrained by the charter, and might have authorized Lord to execute the writings in question, and the association failed to rebut the *prima facie* presumption, he must be held to have been vested with such power.

The argument that if it be granted that the writings embodied an absolute obligation to return and a stipulation as to value in the event of non-return, such conditions were so extraordinary that it must be assumed that authority had not been conferred to agree to them, is equally unfounded. The proposition must rest on the assumption that to charter a yacht upon the conditions referred to was *ultra vires* of the corporation, which, as we have seen is not correct. Certainly an authority to charter a yacht for the purpose of collecting news was clearly within the corporate powers of The Sun Association; the mere signing of a charter party in execution of such a contract was not illegal, nor can it, we think with any plausibility, be said where, in a case like this, the vessel chartered was to be manned, equipped and operated by the hirer, to be taken far from her home port, in time of threatened or actual war, on a presumably hazardous venture, that the agreement to absolutely return or, in default, to pay a fixed value, was so beyond the means incidental to the exercise of the power to charter as to cause the act to be beyond the corporate power. For, if the corporation could have done these things, the agent having the broad powers possessed by Lord had a similar right.

But the case in this regard does not depend upon legal presumptions arising from the general course of business in other

matters, for the following reasons: The evidence clearly justifies the inference that the president and secretary and the other trustees of The Sun Association knew that Lord had exercised the authority to hire the vessel in question; that the possession of the vessel was pursuant to a contract, and that some obligation had been entered into for its safe return. Mr. Hitchcock was one of the four trustees and the secretary of The Sun Association. It was his duty to affix the seal of the corporation to instruments, directed by the trustees, to be executed in a formal manner. He was requested by Lord to execute the writings in question, but he declined to do so. The reasons actuating him in refusing do not appear; but, as he testified that he had nothing to do with the collection of news, it may well be that he felt he could not execute formal documents in a matter not within his department. He does not, however, appear to have regarded the signing of such documents by Lord as improper; for he subsequently, in conjunction with the business manager, who was also a trustee of The Sun Association, signed a check on behalf of the corporation for a $10,000 payment, as recited on the books of the association, for "charter Kanapaha to October 1."

President Dana testified that he was not consulted in regard to the drawing of the papers, and did not in April or May, 1898, know of their execution. He, however, was aware in those months that despatch boats were being used by The Sun to obtain news in regard to the progress of events in Cuban waters, such information having been acquired from several sources, including Mr. Lord. President Dana testified that Lord had charge of the getting of information as to the progress of events in Cuban waters and in connection with the war; that he had talked with him about the matter early in April, 1898, and had inquired if his arrangements were satisfactory. He further testified that if the arrangements made were satisfactory to Lord, they were to the witness, and that that was understood in The Sun office and by the other trustees. Lord attempted no concealment of his actions in respect to the hiring of the Kanapaha. The payments for the hire of the boat, the expenses connected with its management, sundry premiums paid out of the moneys of The Sun Association for insurance upon the yacht, in the sum of nearly $60,000, covering the first five months of the use of the vessel—the later policies expiring only a few days before the loss of the ship—

were entered in the books of The Sun. Besides, the association received, under arrangements made by its business manager and trustee, Laffan, money from various newspapers for accommodations furnished to their reporters on board the Kanapaha. All these matters must be presumed to have been brought to the notice of the board, whose duty it was to manage the concerns of the association. The deductions fairly to be drawn from them are susceptible only of the construction that full discretion in the premises had been vested in the managing editor. The strongest possible confirmation of this arises from the fact that Lord, who, under oath, acknowledged when executing the alleged agreement of suretyship, that he possessed the authority to do so, and who was at the time of the trial below in the service of the defendant and able to be produced in court, was not called to the witness stand.

The contract then being that of The Sun Association, made by its agent, duly empowered to that end, and inuring to its benefit, we are not concerned with the questions of ratification discussed at bar, and we are thus brought to consider the obligations which the contract imposed. And, before passing from the subject just considered, it is to be observed that the facts to which we have referred, if there be ambiguity in the writings, confirm the conclusion that the two writings embodied but one contract made by the agent or The Sun in its behalf and for its benefit. This is manifest, because the taking charge of the ship by the employes of the association, the payment of all the expenses of the vessel, the payment of the rent, the charging of the amount thereof in the books of the Association, the use of the vessel for the purposes of the Association, the receipt of revenues derived from such use, and the other facts previously stated, when considered together, cause it to be impossible in reason to assume that the relation of The Sun Association to the hiring was simply that of a security for Lord as a hirer of the yacht on his personal account.

It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle. This rule was tersely stated by Mr. Justice Bradley in *Clark* v. *United States*, (95 U. S. 539,) where it was said (p. 542):

"A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject. See Jones, Bailm. p. 88; Story, Bailm. secs. 398, 399; Domat, Lois Civiles, lib. 1, tit. 4, sec. 3, pars. 3, 4; 1 Bell, Com. pp. 481, 483, 7th ed."

But it is equally true that where by a contract of bailment the hirer has either expressly or by fair implication assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling and must be enforced according to its terms. In *Strum* v. *Boker*, (1893) 150 U. S. 312, both the elementary principles above stated were clearly expressed by the court, through Mr. Justice Jackson. It was said (p. 330):

"The complainant's common law responsibility as bailee exempted him from liability for loss of the consigned goods arising from inevitable accident. A bailee may, however, enlarge his legal responsibility by contract, *express or fairly implied*, and render himself liable for the loss or destruction of the goods committed to his care—the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

This statement of the binding effect of contracts upon those who enter into them was, in substance, but a reiteration of the principle clearly announced in *Dermott* v. *Jones*, (1865) 2 Wall. 1, where it was said:

"It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him."

Among the cases approvingly referred to in *Dermott* v. *Jones* were *Bullock* v. *Dommitt*, (6 T. R. 650,) and *Breckrock Co.* v. *Pritchard*, (Ib. 750,) holding that an agreement to keep the property in repair created a binding obligation to rebuild and restore the property, even though its destruction had been caused by inevitable accident.

It is to be observed in passing that the principle sustained by these last mentioned authorities is supported by many adjudications. (*Young* v. *Leary*, 135 N. Y. 578, and cases cited.)

We approach, then, the contract for the purpose of determining whether by express agreement or by fair implication it put the

positive duty on the hirer to surrender the vessel at the expiration of the charter and to be responsible for the value, even although impossibility of return was brought about without his fault. The obligation was expressly imposed upon the hirer to keep "said yacht in repair and to pay all its running expenses, and to surrender said yacht with all its gear, furniture and tackle at the expiration of this contract to the owner or his agent . . . in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." Not only this, but the charter party contained the further provision that the hirer "shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like." This provision is immediately followed by a reiteration of the duty to repair, previously stated, by again stipulating "that the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, machinery, tackle, spars, furniture, gears, boats and the like, in repair."

Pausing for a moment to consider the foregoing stipulations it is difficult to conceive how language could more aptly express the absolute obligation, not only to repair and keep in good order to the end of the hiring and to return, but, moreover, to be responsible for any and all loss and damage to the vessel, her fixtures and appointments. These stipulations seem to us to leave no doubt of the absolute liability to return; in other words, of the putting of the risk of damage or loss of the vessel upon the hirer. But if there could be doubt after considering the provisions just above referred to, such doubt is dispelled when it is considered that the contract proceeds to say that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000. And the said hirer shall procure security or guarantee to and for the owner" in the sum stated, "to secure any and all loss and damage which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract." In other words, having provided for all repairs, having stipulated absolutely for the return of the vessel in full repair, having put the risk of any and all loss on the hirer, the contract then in express terms fixes the value of the vessel, and makes provision for security to protect against any and all loss or damage sustained by a failure

of the hirer to fulfill each and all of the positive obligations which the contract imposed.

Concluding, as we do, that by the charter party the absolute obligation to return was placed on the hirer, and that by that contract the risk was hence cast upon him of loss, even be it without his fault, we are led to determine the amount which the owner of the yacht is entitled to recover.

Before passing to this question, however, we remark that we have not entered into any extended review of the case of *Young* v. *Leary*, (135 N. Y. 369,) and the conflict of view asserted in argument to exist between the ruling in that case and that made in *Steele* v. *Buck*, (61 Ill. 343;) *Drake* v. *White*, 117 Mass. 10,) and *Harvey* v. *Murray*, (136 Mass. 337.) We have not done so, because, as we have seen in the opinion in *Young* v. *Leary*, the absolute duty to repair and keep in repair was conceded to import an obligation to restore the property, even if the impossibility of doing so was brought about without the fault of the bailee. Whatever differences there may be, if any, in the opinions in the cases referred to, arises, not because they expound a discordant view of the law of bailment, but from different applications made of that law to the contract which was under consideration in the particular case. But not only the legal principles announced in the cases referred to, but also the application made of such principles in each and all of the cases, render it necessary to construe a contract like the one we have before us as meaning that which we find it to mean.

Recurring to the amount of liability, it appears that there are two inquiries involved in deciding it; the first, was the obligation imposed by the first writing to pay the agreed value of the vessel in the event of her non-return, and, second, if yes, did any modification thereof arise from the second writing? The answer to the first inquiry is afforded by what we have already said in discussing the nature of the obligations assumed by the hirer. As they were to return the vessel in any event, and in default to make good any and all loss arising from a failure to return, the fixing of the value of the vessel can have but one meaning, that is, that the value agreed on was to be paid in case of default in returning. Unless the agreement as to the value meant this it had no import whatever, and its presence in the contract is inexplicable. That the obligation to return or pay the agreed value was not modified by the second writing we think is clear.

In that writing it is provided that The Sun Association bound itself that the hirer would faithfully fulfil and perform all the obligations expressed in the previous writing. Certainly, because of the contract that all the previous agreements are to be fulfilled, it cannot be that some of them were destroyed. But proceeding to make its significance if possible clearer, the second writing adds that the intention of the parties to it is to hold The Sun Association "primarily liable" for the obligations created by the prior writing. To stipulate primary liability for prior obligations cannot be so construed as to destroy them.

True, the provisions just referred to are followed by the stipulation that "all our liability hereunto shall, in no case, exceed the sum of $75,000." This cannot mean that the obligations expressly assumed were destroyed, but that in case they were not fulfilled, the damage brought about by each and every breach should not exceed $75,000. The contrary cannot be said without holding that a provision, which was manifestly intended to add sanction to the obligations, in effect abrogated them. And the import of the clause under consideration is demonstrated by the provision in the first writing, by which it was agreed that the second paper should be signed. The provision is, "The said hirer shall procure security or guarantee, in and for The Sun, in the sum of $75,000, to secure any and all loss and damage which may occur to said boat, or its belongings, which may be sustained by the owner, by reason of such loss or damage and by reason of the breach of any of the terms or conditions of the contract."

The second writing unquestionably stipulated a penalty for the performance of each and all the obligations, but, fixing a penalty, in case of a default, did not extinguish them. The meaning of the provision becomes quite clear when all the provisions are taken into view in their proper connection. They all naturally divide themselves into two classes, the one relating to the payment of the hire, the payment of the expenses of the operation of the vessel, the making of repairs, &c.—from which we may eliminate the hire, as it was to be paid on the execution of the contract; and the other to the duty to return, or pay in default, the value agreed on. We say they naturally so divide themselves, because in no reasonable probability could a default in both cases simultaneously exist. Thus, if the vessel was not returned and the owner got the value as fixed in the contract, he

could suffer no loss for any default of the hirer in failing to pay for repair, &c., or for a breach of the covenant to pay the running expenses of the vessel, as no personal liability therefor could attach to him. And in the event of a return of the vessel, lessened in value by the failure to repair, or burdened with charges, because of default in paying running expenses, no loss could come to the owner if he was indemnified up to the extent of $75,000, the value of the vessel, which, it will be seen, was, hence in any probable event, the maximum sum of liability which the parties supposed might result from a breach of the covenants contained in the charter party.

The contract arising from the two writings having this import, the court below correctly decided that the sum due, as a consequence of a default in the return of the ship, was not to be diminished by the amount of the hire which had been paid at the inception of the contract. To have otherwise ruled would have destroyed in part the express agreement that the failure to return should be compensated by the payment of the agreed value. Such would have been its inevitable result, as it would have reduced the sum due for the default in not returning the ship, by crediting the hirer with the amount of the hire he had paid without default on an independent and distinct liability.

The foregoing considerations are adequate to dispose of the case, if it be that the rights of the parties are to be administered according to the contract into which they voluntarily entered. In substance, however, it is pressed with much earnestness and sought to be supported by copious reference to authority that the intent of the contracting parties should not be given effect to, because it is our duty to disregard the contract and substitute our will or our conception of what the parties should have done for that which they did plainly do. This contention thus arises.

Upon the trial, The Sun Association introduced some evidence tending to show that the value of the yacht was a less sum than $75,000, and it claimed that the recovery should be limited to such actual damage as might be shown by the proof. The trial judge, however, refused to hear further evidence offered on this subject, and in deciding the case disregarded it altogether. The rulings in this particular were made the subject of exception and error was assigned in relation thereto in the Circuit Court of Appeals. That court held that the value fixed in the contract was con-

trolling, especially in view of the fact that a yacht had no market value.

The complaint, that error in this regard was committed, is thus stated in argument: "The naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that, *if the amount is disproportioned to the loss*, the court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically said to be liquidated damages." Now it is to be conceded that the proposition thus contended for finds some support in expressions contained in some of the opinions in the cases cited to sustain it. Indeed, the contention but embodies the conception of the doctrine of penalties and liquidated damages expressed in the reasoning of the opinions in *Chicago House Raising Co.* v. *United States*, (1901) 106 Fed. Rep. 385, 389, and *Gay Manufacturing Co.* v. *Camp*, (1895) 25 U. S. App. 134, 65 Fed. Rep. 794, 68 Fed. Rep. 67, viz., that "where actual damages can be assessed from testimony," the court must disregard any stipulation fixing the amount and require proof of the damage sustained. We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court. And we shall, as briefly as we can consistently with clearness, proceed to so demonstrate.

At common law prior to the statute of 8 & 9 William III, c. 11, in actions "upon a bond, or on any penal sum, for non-performance of any covenants or agreements, contained in any indenture, deed, or writing," judgment, when entered for the plaintiff, was for the amount of the penalty, as of course. (*Watts* v. *Camors*, 115 U. S. 360; Story, Eq. Jur. sec. 1311.) Equity, however, was accustomed to relieve in cases of penalties annexed to bonds and other instruments, the design of which was to secure the due fulfillment of a principal obligation. (Story, Eq. Jur. sec. 1313.) The effect of the passage of the statute was to restrict suitors in actions for penalties to a collection of the actual damages sustained. As a result, also, courts of law were thereafter frequently under the necessity of determining whether or not an agreed sum stipulated in a bond or other writing to be paid, in the event of a breach of some condition, was in reality a penalty or liquidated damages.

Of course, courts of common law, merely by reason of the statute of 8 & 9 William III, referred to, did not acquire the power to give relief in cases of contract, where a court of equity would not have exercised a similar power. Now courts of equity do not grant relief in cases of liquidated damages—that is, cases "when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum, as the just, appropriate and conventional amount of the damages sustained by such act of omission." (Story, Eq. Jur. sec. 1318.) And, as long ago as 1768, Lord Mansfield, in *Lowe* v. *Peers*, (4 Burr, 2225,) said—italics in original (p. 2228): "Courts of equity will *relieve against a penalty*, upon a *compensation;* but where the covenant is to pay a particular *liquidated* sum, a court of equity can *not* make a *new* covenant for a man; nor is there any *room* for *compensation* or *relief.*" Commenting upon the judgment of Lord Eldon in one of the leading cases on the subject of liquidated damages, (*Astley* v. *Weldon*, 2 Bos. & P. 346, 350,) Jessel, Master of the Rolls, in *Wallis* v. *Smith*, (21 Ch. D. 256,) said (p. 260):

"He perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief on the ground that agreements were oppressive where the parties were of full age and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive. At all events, long before his time, it had been well settled in equity that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times, from nothing else."

The doctrine of equity as respects the withholding of or granting relief against a contract because of inadequacy of consideration, illustrates the conservative disposition of equity not to interfere unnecessarily with the contracts of individuals. Equity declines to grant relief because of inadequacy of price, or any other inequality in the bargain; the bargain must be so unconscionable as to warrant the presumption of fraud, imposition or undue influence. (Story, Eq. Jur. secs. 244, 245.)

Whilst the courts of the United States, in actions at law, undoubtedly possess the power conferred upon the courts of common law by the statute of 8 and 9 William III, and whilst recognition of such power was embodied in the judiciary act of 1879,

reproduced in section 961 of the Revised Statutes, the duty of such courts to give effect to the plainly expressed will of contracting parties is as imperatively necessary now as it was at common law after the adoption of the English statute, as will be made manifest by a reference to some of the adjudications of this court.

The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not *bona fide*, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Thus, Chief Justice Marshall, in *Tayloe* v. *Sandiford*, (7 Wheat. 11,) although deciding that the particular contract under consideration provided for the payment of a penalty, clearly manifested that this result was reached by an interpretation of the contract itself. He said (p. 17):

"In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is, to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms they have employed."

And, after having thus established that on the face of the contract it stipulated a penalty and not liquidated damages, the opinion proceeded to refute the construction relied on to sustain the

contrary view that the contract manifested the intention to assess liquidated damages. In connection therewith the Chief Justice observed (p. 18):

"The plaintiff in error relies on the case of *Fletcher* v. *Dyche*, reported in 2 T. R. 32, in which an agreement was entered into to do certain work within a certain time, and if the work should not be done within the time specified, 'to forfeit and pay the sum of £10 for every week,' until it should be completed.

"But the words 'to forfeit and pay' are not so strongly indicative of a stipulation in the nature of a penalty, as the word 'penalty' itself; and the agreement to pay a specified sum weekly during the failure of the party to perform the work partakes much more of the character of liquidated damages than the reservation of a sum in gross."

In *Van Buren* v. *Digges*, (11 How. 461,) also construing a building contract, it was said (p. 477):

"The clause of the contract providing for the forfeiture of ten per centum on the amount of the contract price, upon failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. *Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty.*" [Italics not in original.]

See, also, *Quinn* v. *United States*, 99 U. S. 30; *Clark* v. *Barnard*, 108 U. S. 436, 454; *Watts* v. *Camors*, 115 U. S. 353, 360; *Bignall* v. *Gould*, 119 U. S. 495. The last cited case illustrates the character of disproportion apparent on the face of a contract which has influenced a court when endeavoring to ascertain the meaning of parties to a contract in a stipulation for the payment of a designated sum for the breach of a condition. There the penal sum was $10,000, several breaches of the conditions of the bond might be committed, to each of which the stipulated sum would be applicable, and one such breach might be the failure to obtain a release of a claim of but ten dollars.

The courts in England, as already intimated, consistently maintain the right of individuals, when contracting with each other,

to estimate the value of property or otherwise determine the quantum of damages for a breach of an agreement, where the damage is of an uncertain nature. *Irving* v. *Manning*, (1847) 1 H. L. Cas. 287, 307, 308; *Ranger* v. *Great Western Ry. Co.*, (1854) 5 Ib. 72, 94, 104, 118; *Dimech* v. *Corlett*, (1858) 12 Moore's P. C. 199, 229; *Lord Elphinstone* v. *Monkland Iron & Coal Co.*, (1896) App. Cas. 332, 345, 346; *Price* v. *Green*, (1847) 16 M. & W. 346, 354.

We content ourselves with a few brief excerpts from some of the decisions just referred to. In *Ranger* v. *Great Western Railway Co.*, in the course of his opinion Lord Cranworth said (p. 94):

"There is no doubt that where the doing of any particular act is secured by a penalty, a court of equity is, in general, anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation."

In *Lord Elphinstone* v. *Monkland Iron & Coal Co.*, (1886) App. Cas. 332—a Scotch appeal—Lord Fitzgerald, in the course of his opinion, said (p. 436):

"I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 and 9 Wm. III, c. 11, s. 8; nor does the Scotch law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.

"In the first instance, the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages, irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations we endeavor to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules have been laid down as judicial aids."

In *Irving* v. *Manning*, (1847) 1 H. L. Cas. 287, it was recognized that a policy of assurance was a contract of indemnity, but it was declared that in a valued policy the agreed value was conclusive, and each party must be held to have conclusively admitted that the sum fixed by agreement should be that which the other was

entitled to receive in case of a total loss. In that case the opinion of the judges was delivered by Mr. Justice Patterson, and we excerpt from the opinion of that justice in *Price* v. *Green*, (1847) 16 M. & W. 346, on error from the Court of Exchequer, as follows (p. 354):

"The £5,000 is expressly declared by the covenant to be 'as and by way of liquidated damages, and not of penalty.' It is a sum named in respect of the breach of this one covenant only, and the intention of the parties is clear and unequivocal. The courts have indeed held that, in some cases, the words 'liquidated damages' are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument that the intention was different."

In *Wallis* v. *Smith*, (1882) 21 Ch. D. 256, the leading cases in England on the subject of penalties and liquidated damages were commented upon by the Court of Appeal. Jessel, Master of the Rolls, classified the decisions and *dicta* on the subject. His summary will be found in the margin,* and measuring the contract in this case, by the rules which are embodied in the recapitulation, it follows that the stipulated sum is embraced in the category of liquidated damages.

In *Strickland* v. *Williams*, (1899) 1 Q. B. 382, Lord Justice A. L. Smith appears to have stated an additional class to those mentioned by Jessel, M. R. He said (p. 384): "In my opinion, it is the law that where payment is conditioned on one event, the pay-

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* 1. Where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the court will not sever the stipulations.

2. Cases "in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will, in all human probability, be small—that is, where it is not absolutely necessary that they should be small; but it is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.

Then the question is whether in that class of cases the same rule applies. Now upon this there is no decision. There are a great many *dicta* upon the question, and a great many *dicta* on each side. I do not think it is necessary to express a final opinion in this case, but I do say this, that the court is not bound by the *dicta* on either side, and the case is open to discussion. It is within the principle, if

ment is in the nature of liquidated damages." This but seems to reiterate the proposition of Justice Patterson in *Price* v. *Green*, previously cited. It was undoubtedly meant that the "event" should not be the mere non-performance of an *ordinary* agreement for the payment of money. See, also, per Bramwell, B., in *Sparrow* v. *Paris*, (1862) 4 Hurl. N. 594, 599.

Now the stipulation here being considered, obviously would be within the last class, for it was a promise to pay a stipulated sum on the breach of a covenant to return the yacht to its owner.

With the exception of the more recent decisions, the cases generally on liquidated damages and penalties, as well as those decided in England as in this country, are reviewed in 2 Evans-Pothier on Obligations, pp. 88 to 111, and in a note to *Graham* v. *Beckham*, (1 American Decisions, 331 *et seq.*) A list of some of the later decisions of the State courts is found in the margin.*

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principle it be, of a larger sum being a penalty for non-payment of a smaller sum; but, at the same time, it is also within another class of cases to which I am now going to call attention.

3. The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages.

4. A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does apply and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.

* Hoagland v. Segur, (1876) 38 N. J. Law, (9 Vroom) 230; Wolf v. Railway Co., (1884) 64 Iowa, 380, 386; Burrill v. Daggett, (1885) 77 Maine, 545; Jaques v. Headington, (1888) 114 Indiana, 309; Wibaux v. Grinnell Live Stock Co., (1889) 9 Montana, 154; Wilhelm v. Evans, (1891) 21 Oregon, 194; Hennessy v. Metzger, (1894) 152 Illinois, 505; Willson v. Mayor &c. of Baltimore, (1896) 83 Md. 203, 210; May v. Crawford, (1898) 142 Missouri, 390; Garst v. Harris, (1900) 177 Mass. 92; Illinois Central R. R. Co. v. Southern Seating & Cabinet Co., (1900) 104 Tenn. 568; Weedon v. American Bonding & Trust Co., (1901 North Carolina,) 38 So. E. 255; Young v. Gant, (1901 Arkansas) 61 S. W. 372; Knox Rock-Blasting Co. v. Grafton Stone Co., (1901 Ohio) 60 N. E. Rep. 562; Johnson v. Cook (1901 Washington) 64 Pacific Rep. 729; Taylor v. Times Newspaper Co., (1901 Minnesota) 86 N. W. Rep. 760; Emery v. Boyle, (1901 Pennsylvania) 49 Atlantic Reporter, 729.

The character of the stipulation under consideration, renders it unnecessary to review in detail the decisions of the State courts. There is in them much contrariety of opinion on some phases of the doctrine, but our attention has not been called to any case which sustains the contention that a valuation clause, such as that we are considering, contained in a contract made under circumstances like those which existed when this contract was executed, must be disregarded despite the evident intention of the parties to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht. That the courts of the State of New York do not lend any support to such a contention—which it was strenuously argued at bar they do—we will make evident.

The case of *Ward* v. *H. R. B. Co.*, (1891) 125 N. Y. 230, is not an authority for the contention in question. Equitable relief was sought in that case against the enforcement of a stipulation, which the court, however, held to be liquidated damages and binding on the parties. True the court did say, on page 235, that "where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportioned to the presumable or probable damage, or to readily ascertainable loss, the courts will treat it as a penalty and will relieve, on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance." There is nothing, however, in this excerpt to countenance the claim that where it is clear from the terms of the contract that the precise sum *was* of the essence of the agreement and *was* the agreed amount of estimated damages, no fraud or imposition having been practiced, either a court of equity or of law might rightfully decline to give effect to the stipulation. Nor does the quoted statement support the further claim that a court of law in an action on a contract to recover a stipulated sum as damages might let in evidence to establish that a mere disproportion existed between the agreed sum and the actual damage, for the purpose of avoiding the stipulation. The meaning of the court is made clear by the following statement, appearing on the same page with the above excerpt: "We may, at most, say that where they have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and

the amount is not, *on the face of the contract*, out of all proportion to the probable loss, it will be treated as liquidated damages." An inspection of the opinion in the Ward case also shows that the New York court approvingly referred to prior decisions of the courts of that jurisdiction, (*Dakin* v. *Williams*, 17 Wend. 447, and 22 Id. 201,) where it was emphatically recognized that parties might embody in their contract an agreed valuation of property or any other quantum of damages, where the damage was uncertain in its nature. We quote, in this connection, from the opinion as reported in 17 Wend. delivered by Chief Justice Nelson, afterwards a member of this court. It was said (p. 454):

"The next question presented upon the above conclusion is whether the sum of $3,000 is to be viewed as damages liquidated by the contract of the parties, or only in the light of a *penalty?* There are many cases in the English books in which this question has been very fully examined and considered, but it would be an unprofitable consumption of time to go over them with a view or expectation of extracting any useful general principle that could be applied to this case. The following are the leading cases: *Astley* v. *Welden*, (2 Bos. & Pul. 346;) *Burton* v. *Glover*, (Holt's N. P. R. 43, and note;) *Reilly* v. *Jones*, (1 Bing. 302; *Davies* v. *Penton*, (6 Barn. & Cres. 216;) *Crisdee* v. *Bolton*, (3 Carr. & Payne, 240;) *Randall* v. *Everest*, (2 Id. 577;) *Kemble* v. *Farren*, (6 Bing. 141.) In our court are the following: *Dennis* v. *Cummins*, (3 Johns. Cas. 297;) *Slosson* v. *Beadle*, (7 Johns. R. 72;) *Spencer* v. *Tilden*, (5 Cowen, 144, and note, p. 150;) *Nobles* v. *Bates*, (7 Id. 307;) *Knapp* v. *Maltby*, (13 Wendell, 587.) From a critical examination of all these cases and others that might be referred to, it will be found that the business of the court, in construing this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used, it must be carried into effect. A court of law possesses no dispensing powers; it cannot inquire whether the parties have acted wisely or rashly, in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement. Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance,

a measure of compensation, however extravagant it may be, for a violation of their covenant, (they surely may after it has accrued,) without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and regarding the intent of the parties, it is not to be doubted but that the sum of $3,000 was fixed upon by them 'mutually and expressly,' as they say, 'as the measure of damages for the violation of the covenant, or any of its terms or conditions.' If it be said that the measure is a hard one, it may be replied, that the defendants should not have stipulated for it; or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely, the faithful fulfillment of their agreement."

Chancellor Walworth, in the opinion rendered in the same case by the Court for the Correction of Errors, embodied in his opinion the following (2 Ward, 213):

"In *Hubbard* v. *Grattan and wife,* (Alcock & Nap. R. 389,) in which an action was brought to recover the stipulated damages which the defendant agreed to pay if he did not remove a lime kiln adjacent to the plaintiff's premises, Bushe, Ch. J., says: 'The stipulation consists of two parts, one affirmative that the lime kiln should be prostrated before a particular day; the other negative that the assignee shall not at any future time erect another lime kiln; and upon those the breaches are assigned. Both bear on one object, to be relieved from the lime kiln altogether, and both are essential to that object being accomplished; and both parties agree in measuring beforehand the damages consequent upon a breach of either agreement. Such stipulations as to damages are upheld by courts of law upon two grounds: 1st. Because a man may set a value, not only upon matters connected with his property, which value is capable of being ascertained, but upon matters of taste and fancy, such as prospect or ornament, which he alone can appreciate; and, 2dly, because even in matters capable of ascertainment, great difficulties might occur in some cases; and, in all cases, it is prudent in both parties to provide against the expense and trouble of a future investigation; and the cases which seem to have interfered with such compacts are those in which the subject matter of the stipulation shews that, whatever the form of it may be, the parties could not have contemplated any more than a penalty to secure against actual damage."

So, also, the case of *Bagley* v. *Peddie,* (1857) 16 N. Y. 469, 471, makes clear the fact that the New York courts recognize the right of parties to agree beforehand upon damages to be sustained by the breach of a contract, and that evidence *aliunde* the

instrument declared on cannot be received respecting the amount of damage. The last two of what were termed "artificial rules" on the subject of liquidated damages and penalties, recited in the opinion as being peculiar to contracts of this character, were as follows:

"Sixth. If, independently of the stipulated damages, the damages would be wholly uncertain and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument; Seventh. If the language of the parties evince a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects."

Following a review of several decided cases in England, the court said (p. 474):

"The above cases will serve to illustrate the kind of certainty as to the sum to be paid as damages for breach of an agreement in order to hold the larger sum agreed to be paid on such breach a mere penalty. They are cases where the lesser sum is named specifically in the instrument itself, or depends on the award of arbitrators. These and similar cases are the cases of certain damages to which the courts allude in the third rule."

The court then quoted approvingly the prior decision of the Supreme Court in *Dakin* v. *Williams*, *supra*, and concluded as follows (p. 475):

"The case at bar seems to me to fall within the sixth rule, the damages being wholly uncertain and depending entirely on proof *aliunde* the instrument declared on."

And in connection with the New York cases it becomes pertinent to notice the case of *Gay Manufacturing Co.* v. *Camp*, (1895) 25 U. S. App. 134, on rehearing, 376; 68 Fed. Rep. 67, much relied upon in argument. As we have previously observed, language is employed in that opinion which, broadly interpreted, seems to countenance the idea that if a jury can ascertain the damages suffered by the breach of a stipulation, an agreement by the parties, embodied in a written contract, fixing such damages, will be treated as a nullity. This deduction appears to have been drawn from certain rules of construction respecting liquidated damages and penalties enunciated by the trial judge in *Bagley* v. *Peddie*, (5 Sanford, 192, 194,) the judgment in which case, it is

proper to remark, was reversed by the appellate court in 16 N. Y. 469, already referred to. We do not think, however, the interpretation we have noticed as having been put upon the rules in question was warranted; at least, as we have shown, such a doctrine is altogether untenable. Nor do the other authorities cited in the opinion in the Gay case lend support to the asserted doctrine. Those authorities were *Harris* v. *Miller*, (11 Fed. Rep. 118, 121,) and a note to *Spencer* v. *Tilden*, (1825) 5 Cowen, 144, 150. *Harris* v. *Miller* is referred to because of the statement by Judge Deady, that the courts, "instead of giving effect to the contract of the parties according to their intentions, assumes to control them according to their standard of justice." The note to 5 Cowen need not be commented upon, in view of the reference we have made to later decisions of the courts of New York.

It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach *apparent on the face of the contract*, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security.

In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially, the petitioner claimed a greater right than it would have had if it had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise or mistake, and stated no facts claimed to warrant a reformation of the agreement. Its alleged right to have eliminated from the agreement the clause in question, for that is precisely the logical result of the contention, was asserted for the first time at the trial by an offer of evidence on the subject of damages.

The law does not limit an owner of property, in his dealings with private individuals, respecting such property, from affixing his own estimate of its value upon a sale thereof, or on being solicited to place the property at hazard by delivering it into the custody of another for employment in a perilous adventure. If the would-be buyer or lessee is of the opinion that the value affixed to the property is exorbitant, he is at liberty to refuse to enter into a contract for its acquisition. But if he does contract and has induced the owner to part with his property on the faith of stipulations as to value, the purchaser or hirer, in the absence of fraud, should not have the aid of a court of equity or of law to reduce the agreed value to a sum which others may deem is the actual value. And, as pertinent to these observations, we quote from the opinion delivered by Wright, J., in *Clement* v. *Cash*, (21 N. Y. 253,) where it was said (p. 257):

"When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damages, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. See *Kemp* v. *Knickerbocker Ice Company*, (69 N. Y. 45.) In such cases, there would be room for construction; but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be $500.00, or any other sum, to be paid by either party failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended; but that the intention was to name the sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement."

As the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to show that the admitted value was excessive, and the Circuit Court of Appeals properly gave effect to the expressed intention of the parties.

The decree of the Circuit Court of Appeals was right, and it is therefore

Affirmed.

True copy.

Test

Clerk Supreme Court, U. S.